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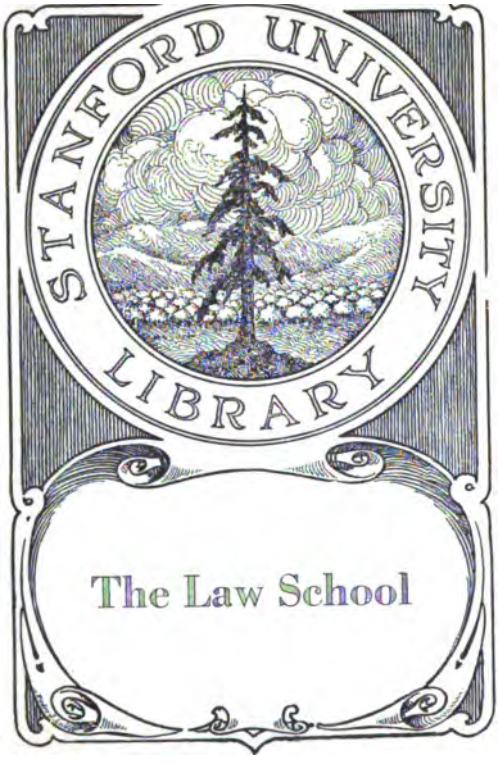
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George H. Hall

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AN

INTRODUCTION

TO

CONVEYANCING,

AND

THE NEW STATUTES

CONCERNING

Real Property;

WITH

PRECEDENTS AND PRACTICAL NOTES.

BY

WILLIAM HAYES, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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TO

JOHN BELL, ESQ. K. C.

SIR,

IF the author presumes to hope that this volume may supply, in some degree, the acknowledged want of elementary works on a branch of Legal Science deeply interesting to a wealthy state, your favourable opinion of the former edition will more than excuse his vanity. By labouring to correct and extend his views, both of the old and the new law, he has endeavoured to prove himself not insensible to the value of such approbation.

The profession, whose respect and esteem have followed you into your retreat, will learn with pleasure that those studies which formed so long the business of your life, are still the objects of your care; that the most important of the Real Property Statutes of the present

reign received some valuable touches from your experienced hand; and that to the merit of having taught the student how to win the steep ascent to legal eminence, and the rarer merit of having shown how that eminence is best adorned by unaffected learning and unassuming manners, you are willing to add the enduring honour of having contributed to amend the laws of your country.

Permit me to unite with those associates of your former toil who are still bound to the oar, in hoping that leisure so well earned and so usefully employed, may be long and uninterrupted;—cheered by the consciousness of living in the grateful recollection of the Equity Bar, which your professional character has exalted, and of the many friends whom your kindness has attached.

I am, Sir,

Your very obliged and obedient,

WILLIAM HAYES.

Cloisters, Temple,
March 24, 1835.

PREFACE

TO

THE SECOND EDITION.

ANOTHER impression of this Work has been called for sooner than the Writer had anticipated. He has, however, revised the Work throughout, and endeavoured, as well by numerous corrections as by some, not inconsiderable additions, to retain the favourable opinion which this early demand would seem to indicate. The practical importance of the new Statute Law has induced him to direct his chief attention to the rendering of the chapter on that subject more accurate and complete, especially with reference to the changes effected by the Fine and Recovery Act.

As no reliance ought to be placed upon any interpretation of the New Statutes without submitting it to the test of a comparison with the very letter of the enactment, it has been

thought desirable to append the Statutes themselves to this volume, adding only such heads to the divisions and sections of the longer statutes as may assist the practitioner in analyzing them or in finding the clause or subject required.

When it is considered that the new Acts have scarcely been the subject of adjudication, and that the opinions entertained in the profession concerning them have not, except in a few instances, transpired, it will be thought, perhaps, that the comments now submitted are chargeable, less with the want of fulness of information, than with the presumption of adventuring too confidently upon ground so little trodden.

Several bills are in progress, and others, it is understood, are in contemplation, partly to reform the old law and partly to amend the new. The projected measures include a bill relating to the Transfer of Property; a bill relating to the Execution, Operation, and even the Construction of Wills (*a*); a bill relating to the Constitution and Jurisdiction of the Ecclesiastical Courts,

(*a*) The policy of requiring all testamentary dispositions to be attested by two witnesses is extremely questionable.

including provisions for the future Cognizance of Wills both of Real and of Personal Estate; a bill to facilitate the Enfranchisement of Copyholds; a bill to amend the Law of Tenure and Escheat; a bill to amend and extend Sir Edward Sugden's Act relating to Infant Trustees, &c.; a bill or bills to amend the New Acts, particularly the Fine and Recovery Act and the Limitation Act;—some of which may pass into laws in the course of the present session, unless it should be considered expedient to allow further time for the late additions to the Statute Book to settle and consolidate, before new materials are accumulated. It is the Writer's intention to keep pace, if possible, with this career of Legislation, by extending his view of the amended law, so as to enable the Practitioner who, though impressed with the necessity of knowing something more than that certain branches of the law have been altered, yet cannot undertake the study of a new system, the means of acquiring, at a moderate expense of time and labour, sufficient knowledge of the nature and extent of the alterations to guide him in their ordinary application.

With the exception of the lights afforded by Mr. Jarman's Commentary on the New Acts in his Work on Conveyancing, and the contributions of Mr. Ingram, the Author has received little assistance in his endeavours to illustrate the new law. Disquisitions on the *old* law, or rather compilations from the old books, are, indeed, numerous and copious, and are not without their use; but the new law has been left, for the most part, to speak for itself.

Much has been effected in the way of juridical reform; more, perhaps, yet remains to be done. Let us hope, however, that whatever is henceforth undertaken in that difficult field will be thoroughly weighed; and that bills, affecting so deeply the permanent interests of the country as those which touch the system of real property law, will not be urged through the session in order to close it with better effect in the estimation of the many who applaud changes which they cannot justly appreciate.

24th March, 1835.

PREFACE

TO

THE FIRST EDITION.

THE writer published some time ago a tract on Registration, which furnished the outline, but merely the outline, of the following INTRODUCTION. The matter is, for the most part, new. His object is to assist the student over the threshold by exhibiting, in a form as concise and as free from technicality as may be, the rise, progress, and actual state of the system under which landed possessions are enjoyed. The demand for such assistance will increase in proportion as legislative alterations diminish the practical value of an accurate knowledge of the details of the old law, without superseding the necessity of a frequent recurrence to its general principles. An Appendix of Forms was requisite to illustrate the text; but both the Pre-

cedents and Notes have been extended beyond their original purpose, in the hope of rendering the volume acceptable to the practitioner, as well as to the student. With the same intention, a somewhat disproportionate space has been allotted to the consideration of the Statutes recently passed for altering the law of Real Property. It is hardly necessary to add, that opinions on the merits or construction of these Statutes, formed at so early a period of their operation, must be received with caution.

6th Jan. 1834.

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ADDENDUM.

Since the observations on the case of *Massey* v. *Parker* (p. 84, note) were written, opportunity has been afforded for ascertaining the sense of the profession, which is decidedly opposed to the doctrine there laid down upon the second, and (as the judgment treats it) "the more important question," namely, "whether the intention to give the income to the separate use of the grand-daughter, if sufficiently expressed, could, under the circumstances, have effect given to it so as to deprive the husband of his ordinary right to the property.' The general impression is, that the inadequacy of the words to create separate property must be considered as the single ground of decision, and though the court did "not think it material to say much upon *that* point," while it enlarged upon the second point, pronouncing it "settled," and over-ruled the demurrer "upon both points," yet that the observations upon the second point are to be treated as extra-judicial. It seems, indeed, to be considered that the later decisions with reference to the effect of a clause against anticipation (and on a misapplication of which decisions the judgment in *Massey* v. *Parker* appears to be founded), cannot be sustained; but that the doctrine, which had been so long received and acted upon by conveyancers, is still to be regarded as the law upon the subject. According to that doctrine, a gift to the separate use of a female, expressly without power of anticipation, was effectual, as well to confer the sole enjoyment as to restrain alienation, whenever the restricted gift and the state of coverture co-existed, but that, as without coverture there cannot be separate estate, and as the right of disposition incident to property cannot, even with reference to a life interest, be denied, except in the instance of separate estate, the object of the gift was competent, while discovert, to dispose of her interest absolutely. Whether the property was effectually given to the separate use, or whether anticipation was effectually restrained, or whether a particular existing or intended coverture only, or the state of coverture generally was contemplated, were questions of construction merely. If it should be said that many transactions rest upon the new doctrine, the answer is, that the number of those which rest upon the old is infinitely greater, and

that a return to the old doctrine is desirable, not only as it regards the validity of past transactions, but as it regards the convenience of future family arrangements. But until the mistake has been corrected by a solemn adjudication, the practitioner will not feel himself at liberty to disregard the recent authorities. It may be proper to add, that before the decision of Lord Eldon in *Brandon* v. *Robinson* (p. 85, note), an impression prevailed that the gift of a life interest might be rendered unalienable by simply appropriating the income to the personal support of the object, and prohibiting anticipation, without regard to the distinction of sex, or to the condition of coverture, or any other circumstance; and the Writer has seen trusts prepared under that impression by the late Mr. Butler, who conceived them to be perfectly effectual, and expressed some surprise when the case of *Brandon* v. *Robinson* was produced. Another very eminent conveyancer treats the decision in *Brandon* v. *Robinson* as an oversight—a contrary doctrine having been laid down in a case decided by Lord Thurlow in bankruptcy.

ERRATA.

Page 57, n. (*c*)—for 4 *Bar. & Ad.* 283, read 4 *Barn. & Ald.* 283.
65, n. (*b*)—dele 3 & 4 *Will.* 4, *c.* 131.
66, n. (*b*)—for 3 & 4 *Will.* 4, *c.* 131 read 3 & 4 *Will.* 4, *c.* 105.
90—dele "3 & 4," in title to Chap. V.
ib. n. (*a*)—for *Part I.* read *Part IV.*
102, line 10—for *B. as protector* read *A. as protector.*
ib. line 6 from bottom—for *as* read *of.*
120, n. (*d*), 3d and 4th lines—for *take on* read *take effect on.*
125, in margin —for *IV.* read *VI.*
127, line 12, and in margin—for *V.* read *VII.*
147, line 6 from bottom—for 47 *Geo.* 3, *st.* 2, read 47 *Geo.* 3, *sess.* 2.
188, line 15—for *coferred* read *conferred.*
216, n. lines 4 and 5 from the bottom—for *possion* read *possession.*
240, margin—for *proprietary uses* read *proprietary rights.*
ib. n. line 8 from the bottom—for *owners* read *owner.*
340, line 3 from the bottom—for *Power* v. *Capron* read *Powis* v. *Capron.*
368, heading—for *stat.* 2 & 3 *Will.* 4, *c.* 74, read 3 & 4 *Will.* 4, *c.* 74.
403, last line but one of text—insert *said* before [*Christian name*].
N. B. 426, n. (13)—for "*An Act for abolishing Fines and Recoveries and substituting more simple Modes of Assurance,*" read "*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*"

AN

INTRODUCTION,

&c. &c.

CHAPTER I.

OF THE NATURE AND EFFECTS OF TENURE.

CHAP. I.

General distribution of the subject.

IT is proposed, in the following historical sketch, to consider the Law of Real Property under three principal divisions. The first division embraces the period of feudal rigour, when the system of tenures flourished severe and pure, without any tincture of equitable doctrines. Some knowledge of its leading principles is not merely desirable as matter of elegant or curious research, but essential to form the sound practical lawyer. The second division exhibits the rise and progress of equitable interests under the name of USES, which, eluding the strictness of tenure, contravened the law and impoverished the seigniory, yet effected on the whole a salutary change, and laid the foundation of greater good. Distinct traces of both these æras are visible in the compound character of our law and the twofold constitution of our judicature. The third division shows by what legislative and judicial steps the materials supplied by the preceding periods were brought into a state adapted to keep pace with the progressive wants of society; how

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the law of tenure was tempered by the infusion of uses in a legal form, and a substituted code of equitable interests was created under the appellation of TRUSTS; Law and Equity advancing together, but each within the limits of its peculiar jurisdiction, till we reach the maturity of the present system. We shall then pause to take a retrospective view of the ground which we have been treading, and to deduce the general result of our observations. In conclusion, the alterations effected by the statutes of the present reign will occupy our attention. Thus, we hope to illustrate the connection between the earliest and the latest fashion of the law, and to impart a practical interest to every stage of our history.

Existing division of the ownership into legal estates and equitable interests.

THE most striking feature in that branch of our civil jurisprudence which concerns the rights of Real Property, is the division of the ownership into the legal estate, and the equitable or beneficial interest. Lord Mansfield, while seeking to subvert the distinction, or at least to confound the administrative functions of the separate tribunals by which Law and Equity are dispensed, described it as peculiar (*a*) to this country: observing, that in all other countries, the possession of property and the right of property are inseparable. Here, however, the line of demarcation is strongly drawn; it runs through our laws and our judicature, dividing Westminster Hall into two parts. Till this peculiarity, if such it may be termed, is completely mastered, the system cannot be understood.

(*a*) 1 Term R. 759, n. But see Ersk. Inst. B. 3, T. 1, S. 32, T. 5, S. 8.

The patriarch of the pastoral age was the judge and chancellor of his tribe, tempering justice with equity. The same relief was afterwards dispensed by the chieftain in his hall. But no rule or precedent was known; rights were enforced, and injuries redressed, upon principles which the great authority already quoted was wont to call "eternal;"—the principles lodged in the breast of the individual judge. After civilization had instituted positive ordinances, Law and Equity still continued to go hand in hand, and formed, in other European states, an intimate connection, acknowledging the same judicature, if not uniting to compose one system.

Origin of the distinction.

But, in this country, particular circumstances produced a different result. The simple institutions of our Saxon ancestors were superseded by the feudal polity of their Norman conquerors. Those soldiers of fortune gave permanence to victory by a regular scheme of military confederation, which, on the decline of the chivalrous spirit, when the personal services of the knight were commuted for the pay of the mercenary, degenerated into a system of fiscal extortion. Under either form, its maxims were inimical to the just rights of property, and at the same time opposed to the territorial aggrandizement of the Church. Freedom of alienation would have loosened, and at length dissolved, the strict connection of lord and vassal; while the unlimited acquisition of land by the religious houses would have exposed the seigniory to civil death. In order to elude the severity of those rules which restrained the one and prohibited the other, recourse was had to an artificial distinction between the property in the soil and the abstract right to the enjoyment. A refinement, thus originating in the

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exclusive spirit of monastic policy, (*a*) was adopted and perpetuated by the enlarged desires of the laity. Though flowing from a source which appeared but little calculated to supply the means of promoting the free interchange of possessions, it was soon turned, by the ingenuity of lawyers and the exigencies of mankind, into the channels of commerce, and has diffused itself through the complicated machinery of our Law of Real Property. The history of this distinction is, therefore, intimately connected not merely with the technical character of the system, but with the progress of manners, wealth, and enterprise.

Condition of real property before the distinction was known,

WHILE the simplicity of the ancient law remained uncorrupted, the ownership was patent and notorious. Men looked for the proprietor in the possessor. The law acknowledged no other title to the land than the visible title which actual investiture conferred. That substantial interest which every landowner had in the subject itself, might, indeed, as contrasted with the refinements of aftertimes, be emphatically termed *real* property. As the wants of society increased, different forms and degrees of ownership were invented; but still the owner, whether for a longer or a shorter period, was, to the extent of his interest, the owner for all purposes and in every court:—the dominion was single; it had only one aspect, which looked directly to the soil.

—characterized by TENURE.

. The grand characteristic of real property was TENURE. Every subject of the realm, possessed of land, held it in subordination to some superior. The king, at once the source of property and the fountain of justice and

(*a*) 2 Black. Com. 262, 328; Gilbert on Uses, 3.

honour, had bestowed large territories on the great barons who immediately surrounded the throne, and who again distributed his bounty through the channels of their numerous dependents. In legal contemplation, at least, all the landowners of the kingdom had thus derived their estates. On this hypothesis, so consonant to the genius and history of feuds, the system of tenures was built; a system which linked every feudatory, by a chain more or less extended, to the crown, and rendered his fief eventually liable to resumption by the sovereign power, from which it had, or was assumed to have, originally proceeded. In all societies, indeed, it seems requisite to constitute an *ultimus hæres*. Among the nations who conceived, in the forests of Northern Germany, the first rude design of our institutions, land was restored, on a vacancy of the possession, to the community or state; here it revested in the king, as the supreme head of the federal body.

Freehold and copyhold tenures, whence severally derived.

The chief who received a grant of land, dedicated the greater portion to arms and ambition, parcelling it out among his martial followers, to be held by the honourable tenure of military service; another portion he allotted to an inferior, yet not degraded caste, to be held by *socage* tenure, which some writers (for the learned are not agreed upon the point) interpret to mean *plough-service;* and the residue he retained to be cultivated by his villeins, or serfs, who were attached to the soil, rather by the chain of slavery, than by the bond of tenure. From the two former classes have proceeded the *freeholders*, and from the latter class the *copyholders* of the present day. It is the history of freehold property in land which we purpose now to trace.

CHAP. I.

Gradual extension of the tenant's interest to a fee-simple.

Some time elapsed after the institution of feuds before the right of inheritable succession was established. In their primitive state, the tenure was precarious, or for a short term only: afterwards it was for life, the lord resuming the tenement on the death of the tenant, and granting it out anew. At length, the son of the tenant was permitted to succeed; an indulgence which was followed by the extension of the grant, first, to the tenant and his issue (i. e. in fee-tail); and finally to him and his heirs, (i. e. in fee-simple,)(*a*) the law marking out a course of descent, which, enlarging by degrees, embraced his relations, lineal and collateral, male and female. On failure of heirs, the land returned, as before, to the lord: and unless express mention was made of the heirs, the grant still expired with the life of the grantee; whence the rule of law requiring the word *heirs* to convey the fee by deed.

Middle lords and sub-tenure.

The tenant who, under a grant to him and his heirs, had acquired a permanent interest, was competent to carve out various interests of less extent, called in law PARTICULAR ESTATES; as, an interest to continue during a given number of years, or during the life of A., or during A.'s life and the existence of issue proceeding from him (i. e. an estate tail). Before the statute of *quia emptores*,(*b*) a tenant in fee was competent to convey the land to a stranger and his heirs, to be held of the tenant making the conveyance and of his heirs, just as such tenant held of *his* immediate superior; so that, by means of sub-grants, or sub-infeudations, leaving no

(*a*) Note, in legal language, *fee*, without more, always imports fee-*simple*.

(*b*) 18 Edw. 1, c. 1, and see (as to tenants *in capite*) 17 Edw. 2, c. 6; 34 Edw. 3, c. 15.

interest in the sub-grantor, save the feudal right to demand the dues and services, and to resume the land on the possible extinction of the sub-grantee's heirs, or by reason of an act of forfeiture, every ownership of the fee was capable of being erected into a manor or seigniory. Thus innumerable petty lords sprang up between the great lords and the tenant of the soil, intercepting the fruits and privileges of tenure. But the creation of new seigniories was in effect prohibited by that statute. Thenceforth A., the tenant, by aliening the tenement to B. and his heirs, or, in other words, by aliening the fee, renounced his dominion for ever, and B., the alienee, became immediate tenant to the lord of whom A., the alienor, previously held. The result was the same if A., the tenant, instead of simply conveying to B. and his heirs, made a conveyance by which the land was destined to be enjoyed by B. for life, and after B.'s death by C. and his heirs; for here, although the ownership was divided between B. and C., yet the whole fee was equally transferred, and all connection with A., the conveying tenant, as completely dissolved; both B. and C., holding directly of the lord above. As B. and C. were equally strangers, deriving title at the same instant from A., the conveying tenant, their common donor, and not the one from the other, there was no tenure as between *themselves;* yet even such contemporaneous donees were connected by a relationship, which, as it will appear in the sequel, was equivalent, for some material purposes, to tenure. But if A., the tenant, sub-granted the land to B. for a term of years, or for life, or in tail only, then, as A., the sub-grantor, parted with an interest *less* than the fee, tenure sprang up; B., the sub-grantee, who was called tenant for years, or tenant for life, or tenant in

The creation of new seigniories prohibited by the statute law.

But sub-tenure may be created by granting a particular interest.

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tail, holding the land of A. and of his heirs, who continued to hold, as before, of the superior lord.

Of the practical influence which tenure exerts at this day.

The state of the law in regard to tenure is the same at this day. So strong, indeed, is the principle of tenure as to impose even upon the sovereign himself (*a*) a legal necessity that all the landed possessions enjoyed by subjects shall be holden, either mediately or immediately, of HIM; but tenure, as between subject and subject, can now be *created* only by conveying an interest *less* than that to which the grantor is himself entitled. If A., owner of the fee simple, dies without leaving an heir, the land *escheats*, or returns to the lord—to the mesne lord, if sub-infeudation anterior to the statute of *quia emptores* (*b*) has interposed a mesne seigniory, if not, to the king, as universal lord—who may re-grant the land. If A. conveys to B. for life, and by the same conveyance gives the land, after B.s death, to C. for life, or in tail, or in fee, the possession, on the determination of B.'s interest *remains over*, (or, to speak more intelligibly, passes on) to C., whose interest is, therefore, called a REMAINDER, and who is himself called a *remainder-man;* and if the interests created by the conveyance exhaust the fee, (as where, in the preceding example, the limitation to C. is in fee,) the land, on failure of such interests, *escheats;* but if the interests created by the conveyance do not exhaust the fee (as where, in the same example, the limitation to C. is for life, or in tail, only,) then the possession, on the determination of such particular interests, *reverts* or returns to A., (or to his heirs,) whose interest is therefore called a REVERSION, and who is himself called a *reversioner*. Thus the fee is held of the lord of the

A REMAINDER, what.

A REVERSION, what.

(*a*) 6 Co. Rep. 6, *b.*; 9 Co. Rep. 123, *a.*
(*b*) *Supra*, 6, n. (*b*).

seigniory, and the tenant owes a species of allegiance to him as the supposed author of the feudal donation, while every interest derived out of, and without conveying away, the fee, is held of the reversioner, and the tenant is bound to acknowledge dependence upon him as *quasi* lord. Hence the principles of tenure pervaded, and still pervade, the whole system of the common law.

Of certain rules and incidents peculiar to tenure.

The rules and incidents peculiar to tenure were many and various. It will be sufficient for our present purpose to observe, first, that the lord was entitled to demand certain fruits and services; secondly, that certain acts or defaults of the tenant, derogating from the rights of the lord, induced a forfeiture of the tenement; thirdly, that the feudal policy required an uninterrupted tenancy of the freehold, forbidding dispositions calculated to produce a vacancy or suspense of the possession, though but for an instant; and, fourthly, that it also enjoined an open delivery of the possession on every transfer by the immediate freeholder of his interest to a stranger.

Forfeiture explained,

Of these fundamental maxims, instituted for the mutual aid and defence of lord and vassal, that which imposed forfeiture, and that which required a continuing tenancy, are material at this day, with reference especially to reversioner and tenant, who stand in a relation similar to that of lord and vassal, and are subject to similar rules. The doctrine of forfeiture is particularly important. Forfeiture was a punishment inflicted upon the tenant who broke his fidelity. The feudal compact imposed upon him the duty of defending the possession, and maintaining unimpaired the rights of the lord. If the dependent threw off his dependence, if he asserted a right more extensive than his grant imported, or attempted in any manner to pluck the seigniory out of the

—as it regards lord and tenant,

CHAP. I.

lord's hands, (*a*) the compact was violated, and the injured lord became entitled to re-possess himself of the feud. So, the reversioner was a species of lord. If, therefore, the tenant for life, whom he had created, did an act tending to divest or defeat the reversion, the law gave the reversioner an immediate right of *re-entry*. It likewise armed the remainder-man with a similar remedy for wrongful acts committed by the particular tenant in possession. It is true that no tenure could subsist between the particular tenant and the remainder-man, for, if A. conveyed to B. for life, with a gift over, on B.'s death, to C. for life or in tail or in fee, the rent and services were due, not from B. to C., the remainder-man, but, if the whole fee was conveyed, from B. to the lord, or, if less than the fee was conveyed, then from B. to A. the reversioner (*b*); nevertheless, B. was bound to preserve the possession for C., and an act of forfeiture committed by B. was punishable by the *entry* of C., whose consecutive right to the possession was consequently accelerated; just as, in the previous instance of tenant and reversioner, the forfeiture of the tenant was punishable by the *re*-entry of the reversioner, whose original dominion was restored. Certain assurances by a tenant for life or for years, tending to deprive the reversioner or remainder-man of his rights, occasion a forfeiture at this day; and it will presently appear that the liability of a tenancy for life, in particular, to a premature termination sensibly affects the state of modern titles.

—tenant and reversioner,

—tenant and remainder-man.

The result of this state of the law.

Several important consequences flowed from the doctrines of tenure, attended, as they were, with a perfect unity of ownership and possession; first, in regard to

(*a*) Wright's Tenures, 4th ed. 203.
(*b*) *Supra*, 7 and 8.

the enjoyment; secondly, in regard to the modifications of ownership, or the kinds of estates and interests which might be created; and, thirdly, in regard to the forms of conveyance.

1st, As to the enjoyment.

FIRST, as to the enjoyment.—It is obvious that the tenant could be deprived of his land only by forcible dispossession, or false judgment of law—by violence or injustice; or by his own dereliction of duty. In those days, indeed, owing to the disorderly state of society, the imperfect occupation of the land, and other causes, possessions were more exposed, than in modern times, to the rude invasion of strangers. Hence, the old law-writers are deeply conversant with *disseisins, abatements, intrusions*;—names for wrongs which can rarely be successful in a more civilized age, when the right of the true owner is commonly protected by the possession of his lessee for years, or his tenant from year to year, (who has superseded the old tenant at will,) and when the courts lend so unwilling an ear to downright usurpation pleading the sanction of obsolete law.

Disseisins, &c. why rare at this day.

2dly. As to the modifications of ownership.

SECONDLY, as to the modifications of ownership.—Since the tenancy was not allowed to be vacant or in suspense for an instant, it was essential to the validity of every conveyance of the freehold that it should be made to take immediate effect. Thus, a conveyance of land from A. to B. to be entered upon and enjoyed at Christmas next was void from the beginning, because the freehold could be conveyed by means only of an actual transfer or delivery of the possession, which, in the case proposed, was not intended to be disturbed till a future period. On the same principle, it was essential that all substitutions, or, in other words, designations of persons to take freehold interests in the land on the determina-

Conveyances suspending the possession, were void.

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tion of prior interests should be so strictly consecutive as to leave no interval of time unprovided with a tenant. If, therefore, A. conveyed to B. for life, and after B.'s death and one year or one day, to C., the substitution of C. was void from the beginning, because it was so framed as to be incapable of taking effect on the instant of the determination of the previous life-interest: it would necessarily have left the possession vacant for a year, or a day, after the death of B. And although a substitution so framed as to be capable in event of taking effect at the moment in which the possession of the freehold should become vacant by the determination of the previous interest, was valid in its creation, yet, if it could not eventually take effect at that very moment, it altogether failed. Thus if A., being life-tenant, with a gift over, on his death, to his unborn children, forfeited his life-estate before the birth of a child, the destination in favour of his children fell to the ground; and so if A., being life-tenant, with a gift over, on his death, to the unborn children of B., either committed an act of forfeiture or died before a child of B. came into existence, no future child of B. could possibly take the benefit of the gift. As the tenancy would not endure even a momentary pause, the next successor immediately stepped into the feud, and, agreeably to the principles already explained, the possession, once vested in him, could not be divested without his own solemn act, nor consequently shift to an after-born child. Upon the same principles too, if the possession once vested in a child or children born before the determination of the life-interest, it would not open to admit a child or children afterwards born.

Substitutions, not eventually capable of effect on a vacancy of the possession, failed.

These substitutions answered to the description already

given of a REMAINDER. If the object of a remainder was ascertained, the remainder was said to be *vested;* if unascertained, it was said to be *contingent.* Thus, when A. conveyed to B. for life, and destined the land, on the determination of B.'s interest, to be enjoyed by C., (instead of *reverting* or returning, as, in the absence of such a destination, it would have done, to A. the former owner,) the remainder to C., a person ascertained, was vested. But, under a conveyance to B. for life, with a gift over, *if* C. should survive B., to C. in fee, C.'s remainder was *contingent,* because the survivorship of C. was requisite to render him the ascertained object of the gift. On the forfeiture by B. of his life-interest, C.'s contingent remainder would have failed, notwithstanding C. had survived B., for the event, happening after the determination of the particular estate, would have come too late. So, in each of the two examples, furnished by the preceding paragraph, of gifts to *unborn* children, the remainder was obviously contingent. In the first of those examples, it was liable to be defeated by the act (forfeiture) of the life-tenant; in the second, as well by his act (forfeiture) as by the act of God (his death). Even at this day the doctrine of contingent remainders (to which we shall have occasion to recur) is of such practical importance as to demand the intense application of the conveyancer.

Remainders, distinguished into *vested* and *contingent.*

The rules of tenure already stated, interdicted alike all destinations calculated to suspend the possession of the freehold, and all destinations calculated to shift that possession from one man to another without those solemn observances which the law had ordained for the transfer of the feud.

Dispositions, shifting the possession before the regular expiration of the tenancy, were void.

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General principles enforced and illustrated.

In truth, the same general principles governed every disposition of the freehold—the necessity of a tenancy always full, and of a public ceremony to change the possession. If the law had sanctioned a disposition to B. from Christmas next, or to A. for life, with a gift over, to take effect at the end of a year after A.'s death, in favour of B., one or other of those principles must have been violated; for the possession either must have been left open until Christmas or until the year expired, or if filled up, must at Christmas or at the end of the year have shifted *sub silentio* to B. Again—if the law, upon a conveyance to A. for life, with a gift over to his future children, had permitted such gift to take effect in favour of children coming into being at any period, whether before or after the determination of his life interest by forfeiture, or if, upon a conveyance to A. for life, with a gift over to the future children of B., the law had permitted such gift to take effect in favour of children coming into being at any period, whether before or after the determination of A.'s life interest by death or forfeiture, one or other of the same principles would have been in danger of repeated violation. There might have been no child born before the failure of the life interest so failing in the parent's life-time, in which case the possession either would have remained vacant, or, if filled up, would have been liable to shift to an afterborn child. Such child, too, if destined to take for life or in tail only, might have been removed by death, or by death and failure of issue, before the birth of another child, when the same state of things would have recurred. Besides, as the number of children varied from time to time, the title to the possession would have

fluctuated, opening or contracting as the objects increased or diminished, without any promulgation of the change. This last example affords a complete illustration of the position—that as well destinations suspending the possession, as destinations shifting the possession, were inadmissible.

Remainders were the only substitutions valid at common law, and why allowed.

However, the law did (as we have seen) allow of a conveyance to A. for life, with a gift over, to take final effect on the *immediate* determination of A.'s life interest, to B. or to the future children of A., or to the future children of B. (i. e. children coming into existence before the dropping of the life interest.) On such a conveyance, the possession was openly delivered to A., the present grantee, to be held and transmitted according to the tenor of the destination, which was simple and precise. His death, or an act of forfeiture committed by him, being the only means by which his life interest could be determined, and the possession move to B. or to the children of A. or to the children of B., this species of substitution precluded the secret introduction of a new tenant: whereas, under a shifting disposition (as to A. in fee, and if B. should pay to A. a sum of money, then to B. in fee,) the possession might have been changed by a clandestine act. Complex dispositions, indeed, were alike unsuited to the policy of the law, and uncalled for by the state of society. Substitutions by way of remainder, while they did not contravene the principles of tenure, abundantly satisfied the simple wants of the age.

Dispositions by the freeholder in possession, and by a remainder-man or reversioner, were subject to the same rules.

The owner of a remainder or reversion was placed, in regard to the disposition of his interest, under the same restrictions as the freeholder in possession. He could not grant his expectant right to A. from Christmas next, or to the unborn children of B., or to A. for

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life, and after A.'s death and one year to B.; nor, in short, make any of the prohibited dispositions already described. It is true, that upon the transfer of a subject of this nature, it could not, like the freehold in possession, be *delivered;* but (as we shall learn in the sequel) an equivalent ceremony was provided, which rendered it necessary that there should be a present grantee. Indeed, such dispositions of the expectant possession would have been productive of the very mischiefs sought to be prevented, since if the possession (in the case first put) had fallen before Christmas, the land must either have been untenanted till Christmas, or have remained with the grantor till that period, and then have tacitly shifted from him to A.

Of the necessity of a present grantee to validate a conveyance, and a contemporaneous substitution to create a remainder.

On every conveyance, therefore, whether of the actual possession, or of the present right to the future possession, there must have been an immediate grantee, capable of receiving the transfer, and his substitutes, if any, must have been designated at the same time to succeed continuously as remainder-men, in a certain regular order, without any cessation or disturbance of the possession. Now if A., the freeholder in possession, conveyed to B. for life, and, as part of the *same* transaction, destined the land on B.'s death for his unborn children, that destination, although contingent, yet being capable of eventually taking effect on the determination of B.'s life estate, was, as we have shown, valid as a *remainder.* But if A. conveyed to B. for life, stopping there, then the right to the land after B.'s death, being undisposed of by the conveyance, *reverted* to A. the grantor; and if A. afterwards, by a *distinct* conveyance, granted that right—his reversion—to the unborn children of B., the grant was absolutely void. The reason of the differ-

ence will appear from what has already been said. In the former case there was a present grantee (B.) to whom the possession was delivered, for the benefit of himself and the unborn children, according to the tenor of the destination; while, in the latter case, there was a substantive gift to non-existing objects, so that the very basis of a valid grant was wanting. These examples illustrate as well the distinction between a future destination, good in law as a remainder, and a future destination unsupported by a particular estate of freehold, and, therefore void in law, as the distinction between a remainder and a reversion.

A conveyance might be defeated, but not be modified, by means of a *condition*.

It is true, indeed, that a conveyance might have been made subject to the performance of a *condition*, but the rules in regard to conditions were equally contracted. If A. conveyed to B. on the condition of his (B.'s) paying 10*l.* to C., a stranger, at Lady-day next, and B. failed to pay the money, C., to whom it was made payable, was without redress; for the law gave, and strictly confined the remedy to the grantor (A.) and his heirs, who retained, as incidental to his original dominion, the right of punishing the breach by resuming the land. That remedy, which was in one respect too narrow, was in another too sweeping; for the law, while it enabled the grantor and his heirs alone to take advantage of the breach, attributed to his or their re-entry the effect of defeating the conveyance altogether. By entry for a *forfeiture* incurred when the particular tenant failed in his implied duty to those in remainder or reversion, the title under the conveyance creating the duty, was, except in regard to the interest of the wrong-doer, restored; but by re-entry for an express *condition broken*, the title

Different effect of entry for forfeiture, and of re-entry for condition broken.

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under the conveyance imposing the condition, was entirely overthrown. It followed that though the estate of B. (in the preceding example) might be defeated by means of the condition, yet that a gift over to C. on breach of the condition would have been bad, and that the possession, therefore, could not be shifted from one man to another by such agency. (*a*)

3dly. As to the modes of conveyance.

THIRDLY. As to the forms of conveyance (a subject which we have been obliged in some degree to anticipate).—Since all conveyances were of the present possession, or of the present right to the future possession on the determination of some existing interest, they had respect to the corporeal subject—the soil. The ordinary *assurances* were—First, a FEOFFMENT, adapted to confer a title to the immediate freehold, being a visible transfer of the possession of the feud, by the ceremony (technically called *livery of seisin*) of delivering upon the land, in the presence of witnesses, a detached portion of the soil, or some other symbol—a solemn investiture, which, while the art of writing was rare, supplied the only evidence of the transaction, and which, although written evidence is now required by statute, (*b*) still continues to be the operative part of the conveyance. Secondly, an EXCHANGE, by which two owners, equal in regard to the quality of their interests, bartered land for land, completing the mutual transfer by entry, without livery. Thirdly, a DEMISE or LEASE adapted to carve out a term of years, and requiring also to be completed by the actual entry of the lessee upon the land. Fourthly, a RELEASE adapted to extend the in-

FEOFFMENT.

EXCHANGE.

LEASE.

RELEASE.

(*a*) Sugd. Gilb. Uses, Introd.

(*b*) Statute of Frauds, 29 Cha. 2, c. 3.

terest of a tenant for life or for years, (*a*) by superadding the expectant interest; so that such a tenant, on purchasing the remainder or reversion, accepted from the remainder-man or reversioner a *release* of his estate. Fifthly, a SURRENDER, by which a tenant for life or for years yielded up his estate to the next in remainder or reversion. Sixthly, a GRANT, adapted to pass an estate in remainder or reversion to astranger (i. e. not a person previously in the tenancy, capable of accepting a *release*), and requiring (since a remainder or reversion did not admit of livery or entry) to be made by *deed*, perfected by the *attornment* or submission of the particular tenant to the grantee, as his future lord. (*b*) Seventhly, an ASSIGNMENT, by which a term of years, or any other interest less than freehold, was transferred; but as the ancient law, chiefly concerned about the dignity of the freehold, took small account of such inferior interests, no extrinsic ceremony was required to perfect the transfer. This distribution of common law assurances (*c*) may be thought to require some correction, inasmuch as the term FEOFFMENT is confined, in strictness, to the feudal donation of the *fee*, as distinguished from a conveyance creating an estate tail, which is called a *gift* in tail, and from a conveyance creating an estate for life, which is called a *lease* for life; while the term ASSIGNMENT extends to the transfer of an estate for life, as well as of a term for years; but, since *livery* was essential to the creation and transfer of *every* freehold interest, the dis-

SURRENDER.

GRANT.

ASSIGNMENT.

(*a*) A mere tenant at will is also capable of a release, but not a tenant at sufferance. Co. Litt. 270 *b*.

(*b*) *Vide suprà*, 16.

(*c*) *Vide infrà*, Prec. Part I.

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tribution here adopted is perhaps the most distinct and the most agreeable to received notions.

The list of the common assurances of the realm will be complete, if we add matters of record, viz. First, a FINE, which bound the interests of married women, and with the aid of the statute law, (*a*) barred adverse rights, and defeated the succession of heirs in tail; Secondly, a RECOVERY, of force to disappoint as well heirs in tail as all posterior claimants, and to cut the knot of the strictest settlement. Fines and recoveries were suits in the Court of Common Pleas, by which a title was gained under the sanction of a solemn judgment of law. These, in process of time, came to be considered as mere modes or forms of conveyance, but possessing some extraordinary efficacy, and surrounded with much technical mystery. In this state they continued to survive the reasons and the learning on which they were founded, till a recent statute, (*b*) (of which we shall treat at large in a subsequent chapter) totally abolished them, transferring their more useful properties to an ordinary deed.

FINE.

RECOVERY.

Tenant for life conveying by feoffment, fine, or recovery, incurred a forfeiture.

It has been observed that certain assurances by the tenant of a limited interest occasioned a forfeiture of that interest. Those assurances were releases with warranty, feoffments, fines, and recoveries, purporting to convey an interest more durable than that to which the tenant was justly entitled. If a tenant for life or for years assumed by a feoffment, fine, or recovery, to confer a title to the fee, he forfeited the tenement, because by such an act he repudiated the tenancy, and usurped the rights of the persons entitled in remainder or reversion. Such con-

(*a*) 4 Hen. 7, c. 24; 32 Hen. 8, c. 36.
(*b*) 3 & 4 Will. 4, c. 74. *Vide infrà*, Chap. V.

veyances were called *tortious*, or wrongful. This doctrine holds practically at the present day in regard to assurances by feoffment, though no reason now exists for ascribing to any assurance by the owner of a partial interest a stronger operation than that of transferring the interest which he may rightfully alien. The existing law is clear, that if A., to whom land is given for life, with a gift over on his death to B., assumes to convey by feoffment, to C. and his heirs, the life interest of A. is forfeited, and B. is entitled to take immediate possession of the land; but we are obliged, when asked to account for this result, to retrace the history of society—to travel back to that remote and lawless period when the lord confided the possession to his vassal upon the express or implied condition that the tenant should preserve and restore it,—a condition which was broken by his attempting to establish a stranger in the tenancy, or a foreign lord in the seigniory. The *lord*, indeed, is no longer permitted to re-enter, unless the land escheat for want of heirs; his remedy at this day for the fruits of tenure, as chief rents, heriots, &c. being by distress, (*a*) but a right similar to that which the lord has lost is still exercised by the remainder-man or reversioner.

Land was not devisable.

Enough has been said of the feudal policy to render it almost superfluous to add that testamentary dispositions (except so far as local customs authorized such dispositions of socage lands in some ancient cities and boroughs) were wholly interdicted. To have permitted

(*a*) 52 Hen. 3, c. 22. If, however, the tenant ceased to pay rent for two years, there being no sufficient distress upon the land, the lord might have had a *cessavit* and recovered the fee. 6 Ed. 1, c. 4; 13 Ed. 1, c. 21. *Sed vide* 3 & 4 Will. 4, c. 27, s. 36. But such details are purposely avoided in the text.

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the transfer of the tenement by will would have been to sacrifice the principles already developed, together with the valuable fruits of tenure arising from descents.

Alleged simplicity and safety of the common law.

Since the modifications of property were so few and so simple, and since either livery, entry upon the land, attornment, or matter of record, was essential to every disposition, our ancestors were necessarily strangers to the intricacies of modern titles, and to that perfect secrecy and ease with which rights to real estate may now be created, transferred, varied, or defeated.

But the publicity of livery and attornment declined with the feudal system.

But in speaking of the notoriety which formerly attended the transfer of land, we must be understood to point at a very early period, when feuds were yet maintained in all their purity and strictness. Then every manor presented a little society of warriors and husbandmen, combined for mutual defence and support. As a new associate could not be introduced without the privity of the lord and his existing tenants, *livery* was a public installation, witnessed and sanctioned by the federal body. As a strange lord could not be imposed upon the tenants against their will, *attornment* was the open adhesion of the vassals to a new chief. In either case the transaction was recorded, or at least promulgated, in the court of the seigniory. Even among the Saxons the transfer of land was authenticated by inrolment in the local court. While substitutions, or, in other words, particular estates, with expectant remainders, were either unknown or extremely rare, and while a conveyance, therefore, was merely a transfer from one individual to another of the present possession, which carried with it all the rights consistent with the then limited notions of ownership, perfect publicity was insured. But when the feudal severity began to

abate, when alienation grew more frequent, and artificial modifications of property sprang up, livery and attornment lost much of their solemnity. The possession was now delivered in the presence of only a few casual witnesses, and if the land was destined to be enjoyed by A., the feoffee, during his life, and after his death by B. and his heirs, the intention was either declared by parol (i. e. by word of mouth,) or by an unrecorded instrument, called a charter of feoffment. (*a*) Thus, neither the change of possession, nor the nature of the destination, was sufficiently promulgated. Again, if B. afterwards, in the life-time of A., made a *grant* (i. e. by deed) of his (B.'s) remainder in the land, the attornment or consent of A., the life-tenant, was sufficient to complete the transaction. Thus a right to the future possession, which had been privily created, was yet more privily (though more certainly) aliened. Hence, long before the introduction of *uses* (of which we shall presently speak) complaints were not wanting of secret assurances of land.

Frequency of secret feoffments and grants.

Large deductions must, therefore, be made from the praise lavished on the ancient common law, when its provisions are said to have promoted security of enjoyment, simplicity of title, and notoriety of transfer. As civilization advanced, it proved less and less sufficient to attain those favourite objects of its founders, while it was manifestly ill-adapted to meet the growing demands of freedom and commerce. The rules of ownership and modes of assurance, which we have endeavoured to explain, composed a rigid and cumbrous code, utterly inadequate to the extended views and complicated interests of an intelligent and wealthy community. The progress of society called for a more pliant and liberal policy.

Inconveniences of the common law.

(*a*) *Vide infrà*, Prec. Part I.

CHAPTER II.

OF THE NATURE AND EFFECTS OF USES.

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Introduction of equitable interests, under the name of USES.

HITHERTO the system was purely possessory, founded on the direct dominion over the *land*. An important change was effected by the introduction of equitable interests, founded on confidence in the *person*. The estate of the old common law proprietor was actual and apparent; the right of the new beneficiary presented nothing either tangible or visible. The legal owner of the land contracted a moral obligation to hold or dispose of it for the benefit of another, who was said to have the USE. Thus A. conveyed land to B., to his (A.'s) own use, or to the use of C. This declaration of the use charged the *conscience* of B., the legal feoffee or grantee, but did not attach itself to the *land;* for (says Lord Coke) "it would be absurd to say that confidence and trust can be reposed in land, which, in regard to sense, is inferior to brute beasts, and it would be less absurd to say that beasts may be trusted, who have sense and want reason, than that land, which wants sense and reason also, may be trusted."(*a*) If, therefore, B. refused to account to his *cestui que use* (A. or C.) for the profits, or wrongfully conveyed the estate to another, it was merely a breach of confidence on the part of B. for which the common law gave no redress; much less did that law acknowledge any right in A. or C. to the possession or enjoy-

Nature of a use.

The common law judges refused to notice uses.

(*a*) 1 Co. Rep. 127, *a*.

ment of the land. The ordinary judicature knew no other proprietor than B.; to him, and to him alone, attached the privileges and liabilities of a landholder; for *he* it was to whom the possession was legally delivered. To have regarded A. or C. in any other light than that of a mere stranger to the soil would have been to subvert a system raised upon investiture and tenure. It was accordingly decided at a very early period (*a*) that the common law judges had no jurisdiction whatever in regard to the *use*.

Uses upheld and enforced by the Court of Chancery, as binding the conscience of the legal owner, but not the land.

But under the auspices of an ecclesiastical chancellor, the use, though alien to the soil, took root in the system, and attained to a degree of influence and importance which at length almost superseded the ancient polity. Means were soon devised for compelling B., the owner in point of law, to keep good faith towards A. or C., the owner in point of conscience. The king, in his Court of Chancery, assumed jurisdiction to extort a disclosure upon oath of the nature and extent of the confidence reposed in B. and to enforce a strict discharge of the duties of his trust. Hence EQUITY arose. From this period, when the right of A. or C. became cognizable in the Court of Chancery, we may speak of him as the equitable or beneficial owner, and of B. as the legal owner. But in order to preserve a clear perception of the twofold character of the system, we must keep steadily in view the fact—that B. had still the *real* right, to be enforced on one side of Westminster Hall by judgment of law *in rem*, directed against the land itself, while A. or C. had nothing more than a mere right *in personam*, to be enforced on the opposite side of the Hall, by subpœna, (*b*) directed against the individual trustee. The Chancery, in assuming jurisdiction over

(*a*) 4 Edw. 4. (*b*) Richard 2.

the use, left untouched and inviolate the ownership at common law. It exercised no direct authority over the land, but only coerced and imprisoned the person of the legal owner who obstinately resisted its authority. It did not usurp any of the powers or functions of a court of law, but, leaving to the latter the redress of wrongs done to the realty, confined its jurisdiction to matters of trust and confidence, which could not be reached by the arm of ordinary justice.

Opposite characters of the legal and equitable ownership.

Now a moment's reflection will point out the essentially different nature of the legal and equitable ownerships—of the estate in the land, and the use. The latter, being the creature of conscience, the offspring of moral obligation, could not be the subject of *tenure;* it could yield no fruits, owe no duties to the lord. It was neither liable to forfeiture, nor susceptible of livery. As the rules of tenure, to which we have adverted, were inapplicable to this secret and subtle agent, often created by a breath and destroyed by an oath, the ownership might be moulded and shifted, through the medium of the use, to answer various purposes unattainable at law. Contingent dispositions of the use were not exposed to those accidents to which contingent remainders were liable at law. The use, too, might be transferred without any of the ceremonies requisite to the conveyance of the land at law.

Uses not amenable to the rules of the common law,

In short, by the introduction of uses, as well the cardinal maxims of feudal policy, as many of the established rules of property were virtually defeated. The clergy, who were prohibited by law from purchasing land, but who could now take the profits to any extent without becoming the legal owners of a single rood, increased their possessions. The factious baron vested his estate

in a few confidential friends, and committed treason with comparative safety. The peaceful proprieter, adopting the same precaution, enjoyed and disposed of the beneficial interest, unvexed by the exactions of the lord, and regardless of the rules of the common law. That system, of which the foundations were laid in the soil, which was held together by tenure, and which directed the whole force of its policy to bind, regulate, and manifest the relationship of lord and vassal, could find nothing congenial in the unsubstantial use. It had never contemplated the possible existence of the beneficial interest as a naked right abstracted from the land. When it required that there should always be a freeholder in possession—that a new tenant should not be introduced without the knowledge of the lord—that the tenant should render service and tribute to the lord—enjoining, therefore, as well regularity in the order of substitutions, as publicity of conveyance, and visiting with forfeiture acts of insubordination,—it plainly excluded, no less by its institutions than by its genius, the mere beneficial right. Where land was conveyed to A. to the use of B. for life, it would have been absurd to hold that if B. arrogated to himself the ownership of the fee, his *use* was forfeited—forfeited, wherefore and to whom? The use was matter of confidence between himself and his trustee A., being held by the tenure of A.'s honesty. So, where land was conveyed to A. in fee, to the use of B. for life, and after B.'s death to the use of the unborn children of C., or to the use of B. in fee, and on payment to him by C. of 10*l.* then to the use of C., it would have been equally unreasonable to require, in the former case, that the children of C. should be in existence to take the use at the very instant of B.'s death, or to pro-

—nor liable to forfeiture,

—nor restricted as to the modifications of ownership;

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hibit, in the latter case, the eventual shifting of the use from B. to C. With what show of *equity* could A. the trustee have refused to fulfil the one destination, because it did not immediately succeed, or the other, because it tended to abridge the preceding destination; or, indeed, have refused to obey any reasonable direction of the owner? Again—if land was conveyed to A. and his heirs, to the use of B. and his heirs, was it possible that on a sale by B. to C. there could be any solemn delivery of the *use?* or, that on the death of B. without an heir, the lord could claim the *use* in right of his original dominion over the soil? While, therefore, the land itself remained under the yoke of tenure, the use issued forth a new creation, free to receive every varying impression, and by its ductility and secrecy admirably fitted for many salutary as well as many fraudulent purposes.

—or the forms of conveyance.

Equitable interests were devisable.

Among the public benefits conferred by uses, was one of the most important and valuable privileges of the landowner,—the power of disposition by will; (*a*) a power which seems necessary to complete a just conception of *propriety.* The land itself was not yet devisable, but the legal owner was bound in equity to observe the testamentary destination of the person to whom the use or beneficial right belonged.

Opprobrious epithets bestowed upon uses.

So utterly repugnant were uses to the principles of the common law, or rather so hostile was the spirit of that law to the facilities which the use held out, that the language of the old books and statutes in speaking of this novelty, is the language commonly of reproach, and sometimes of horror. Contemporary lawyers and legislators describe uses as subtle and crafty, devised by fraud

(*a*) It is worthy of remark, that trusts were introduced among the Romans to evade certain restraints on testamentary disposition. Just. Inst. II. 23—1 & 2.

to cheat the king and all other lords; to deceive purchasers; to raise trouble and unquietness between the subjects of the realm. They are even styled *impious*, although nurtured in the bosom of the church, and enforced in Chancery as obligations binding on the consciences of men.

Equitable contracts, raising uses.

Contracts, creating uses, were now frequently substituted for conveyances of the land. Under the old law alienation was difficult and rare; when a sale did take place, the land was at once conveyed to the purchaser. But uses introduced the practice of making an agreement to sell, which bound the conscience of the vendor, who, continuing in the legal possession, was considered as holding it to the use of the vendee. EQUITY would not enforce a gratuitous agreement, (*nudum pactum*,) but lent its aid to a purchaser who gave a valuable consideration in money or money's worth. The existence of that necessary ingredient was implied in the very name of the transaction, a BARGAIN AND SALE.

BARGAIN AND SALE.

COVENANT TO STAND SEISED.

Sometimes the legal owner, desirous of settling his estate on marriage, or fixing it in his family, covenanted to hold and dispose of the land to uses in conformity with the intended destination, instead of either making a direct legal settlement upon the objects, or a legal conveyance to trustees for their benefit. EQUITY enforced the obligation, so far as the uses were sustained by the consideration of marriage or of relationship in blood, but no farther. An engagement of this nature was called a COVENANT TO STAND SEISED, i. e. to uses.

Consideration essential to bargains and sales, and to covenants to stand seised.

Through the medium of such contracts, raising uses without any change of the legal possession, the purposes of alienation and settlement were accomplished. In both instances the land remained in the contracting owner—in the bargainor or covenantor—the whole effect

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of the transaction being the creation of an equitable right by charging his conscience; in both instances too, the appropriate consideration was essential to the validity of the use. But, at the common law, which regarded the solemnity, and not the consideration—the act rather than the inducement—a conveyance purely voluntary was effectual. Upon a legal conveyance, indeed, the rent and services to be paid and performed by the grantee might be deemed to furnish a valuable consideration.

—but not to an actual conveyance to uses.

And where the land was actually conveyed at law, even EQUITY held uses gratuitously declared upon that conveyance to be valid. If, therefore, A. the legal owner, moved by mere friendship or good will, conveyed by feoffment or other common law assurance to B., to the use of C., then, as A. had parted with the legal possession, and B. had accepted it expressly for the benefit of C., the donation was complete in regard to A., while the conscience of B. was clearly charged with the use.

Two modes of raising uses, *viz.* by transmutation of possession, or without.

Thus, two different modes of creating uses were established; the one producing its effect by engrafting the equitable right upon an actual transfer to a stranger of the legal possession, as when A. *conveyed* to B. to the use of C.; and the other by converting the owner of the land and author of the use into a trustee, without any disturbance of the legal possession, as where A. *contracted* that B. should have the use. This distinction is material, as will hereafter be shown, with reference to the classification of modern conveyances.

Uses governed, in most points, by analogy to the rules of law.

When the Chancery had taken the use under its protection, settled rules became necessary for its government. These rules, with a few exceptions, were assimilated to the rules of law. Thus, if land was conveyed to A. and his heirs, to the use of B. and his heirs, the *use* descended to the heirs of B. according to the course

of succession marked out for the devolution of the *legal* inheritance. The analogy, however, could be pursued no further than the resemblance held. It entirely failed, as we have seen, in regard to the peculiar principles of tenure. The beneficial interest might devolve from father to son, or be enjoyed for a period commensurate with a tenancy, for life, in tail, or in fee, but it could not, from its very nature, be the subject of feudal ceremonies, duties, or exactions.

Different kinds of uses.

Before we quit this branch of the subject, it will be proper to add a few remarks explanatory of the different species of this new genus, the use.

Official or active uses.

Uses had for their object either the discharge of some office concerning the land, or the mere permissive enjoyment of the profits by the intended beneficial owner. If A. conveyed land to B. with a direction to sell and distribute the produce among the children of A.; or to pay out of the rents the debts of A.; or to convey to C. an infant when of age, and manage the estate in the mean time; in each of these cases an active duty was imposed upon B. for the benefit or *use* of the children, the creditors, or the infant. For the performance of that duty, it was necessary that B should be invested with the legal dominion or control over the property. But if land was conveyed by A. to B., simply to the use of C., the whole duty of B. consisted in holding and defending the possession for C., in permitting him to enjoy the profits, and in conveying the land according to his direction.

Permissive or passive uses.

Official uses dictated by the permanent wants of society.

Uses of the first description, which may be called *official* or *active* uses, are obviously suited to the convenience, if not demanded by the exigencies, of every civilized community. Such confidences were, indeed, scarcely less dictated by the wants of mankind, than

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" those personal trusts, which are better known in our law by the name of deposits or bailments (i. e. of moveable effects); for imagination can scarcely trace a period so remote, in which man, in society, was not sometimes induced to trust another with the object of his care or the fruit of his industry." (*a*)

Permissive uses dictated by the rigour of the law.

But it is equally apparent that uses of the second description, which may be called *permissive* or *passive* uses, must have owed their origin to the rigour of existing institutions, denying to the acknowledged legal proprietor that rational dominion, which is no less essential to the happiness of the individual, than conducive to the best interests of society, and prompting men to devise this indirect and secret mode of enjoying and disposing of their estates. While the exemption of uses from the prohibition against taking land in mortmain rendered them acceptable to the clergy, so ready a method of eluding the yoke of tenure could not but prove highly valuable to the people, circumscribed by the narrow doctrines of the common law, and groaning under the oppression of *wardships, marriages, reliefs, escheats* to the lord, forfeitures to the crown on attainder, and other feudal inflictions—all, or most of which, were evaded by this subtle invention. Hence the frequency of mere permissive uses.

Uses further distributed into—

Uses are further distributable into *express* uses, created by the declaration of the party; *constructive* uses, raised by the inference of equity, from the nature and object of the transaction; and *resulting* uses, produced by the attraction of the former ownership, and bearing some analogy to the reversion of the common law. If A. conveyed land to B. to the use of C., the

—express uses,

(*a*) Sand. Us. 4th ed. 7.

benefit belonged, by the very terms of the conveyance, to C., who had, therefore, an *express* use. If A. conveyed land to B., subject to a condition making void the conveyance on payment by A. to B. of a sum of money at a given time, (or, in other words, made a *mortgage* of the land,) B., on non-payment of the money, became, to all intents, the legal owner of the land; but though the conveyance was thenceforth an *absolute* alienation at law, it was still regarded in Equity as a mere *pledge*, entitling B. to hold the land for the purpose only of effecting the liquidation of his debt, subject to which purpose, the use belonged by intendment to A., who had therefore a *constructive* use. If A. conveyed land to B., to the use of C. for life, without more, then, in the absence of circumstances affording an inference that B. was to retain the land for his own benefit after the death of C., the use, after C.'s death, returned to A., the grantor, who was, therefore, said to have a *resulting* use (*a*). Equity, in short, administered the use, or beneficial interest, according to the dictates of conscience, holding it unjust that the land should be retained by a creditor, whose debt was satisfied, or by a grantee in whose favour no use was declared or could be reasonably implied. We shall have occasion to recur at a later stage of our history to this distribution of uses.

—constructive uses,

—resulting uses.

One striking peculiarity in this new species of ownership requires to be particularly marked. As the use had its beginning in personal confidence, so its continuance, as a binding obligation on the legal owner of the land, was measured by the continuance of that confidence. The bond was dissolved by the transfer of the possession

Alienees of the land, taking without notice of the use, were not bound by it;

(*a*) *Vide infrà*, "Observations on Resulting Uses."

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to a stranger, unapprised of the existing use, and contracting to have the land to his own use. Thus, if A., the legal owner, holding to the use of B., conveyed to C., a purchaser, who, in ignorance of the use in favour of B., paid a valuable consideration for the conveyance, C. was considered as coming to the possession with a clear conscience, and by a new right, founded on contract, which entitled him to hold the land for his own benefit, discharged of the use in favour of B. By this transaction, B. lost the land in respect of which the use was originally created, inasmuch as the conscience of C. was wholly unaffected by the confidence reposed in his vendor (A.), who failed to impart his fiduciary character to C. As against the purchaser (C.), who stood upon his legal title innocently acquired, there was no ground for equitable relief. Not so, as it regarded A., the person intrusted; for B.'s equity continued in full force against him, and he was compellable to make good the loss occasioned by his fraud. And, although, in the result, B.'s situation was not identically that in which he would have stood if the fraudulent sale had never occurred, yet no essential change had taken place in his equity, which, in its origin, was nothing more than a personal remedy against the confidential holder of the land for the value of the beneficial enjoyment, the right to which enjoyment constituted the use. The *very* land was irrecoverably gone, but the use remained; and while the conscience of the person *to* whom the possession had passed was unaffected, the person *from* whom it had passed was still liable, as before, to fulfil the equities implied in the use. This result demonstrates that uses had no local attachment to the soil, but were capable of an independent existence as personal confidences between man and man, and were placed

but the remedy of the equitable owner was against the trustee fraudulently selling.

Inference thence drawn, that the use was unconnected with the land.

as such manifestly without the pale of that system under which the land was held and enjoyed.

The use bound a gratuitous transferee of the land without notice;

On the other hand, a transfer, purely voluntary, of the legal ownership did not alter the direction of the use. If, therefore, A., holding the land to the use of B., made an actual conveyance to C., without notice to C. of the use, but unsupported by a valuable consideration, the use was binding on C., Equity treating the transaction as a gratuitous substitution of C. for A.—a change of the person of the legal owner, without any alteration of the equitable title. That confidence which had been expressly reposed in A. was tacitly communicated to C.

but did not bind strangers entering adversely, nor bind the lord.

It should also be observed, that those persons only were liable to perform the use, who succeeded to the legal ownership in respect of which the confidence was originally reposed. Consequently, neither a stranger, acquiring the possession by wrong, nor the lord, who in virtue of his superior and pre-existing right, resumed the land on forfeiture, or on failure of heirs of the legal tenant, nor the reversioner who re-entered for a condition broken, was affected by an equity created in relation to a title thus defeated or exhausted.

Summary of the risks incident to the equitable ownership.

The equitable owner was, therefore, liable to lose the land, as well by the fraud or neglect, as by the misfortune, of the legal owner—by his alienation without notice, his expulsion by an adverse claimant, his attainder, or the natural failure of his heirs.

Nature of EQUITY—the vulgar notion corrected.

Thus, there existed two opposite kinds of proprietorship, susceptible of different modes of disposition, and governed by separate jurisdictions. This topic has been insisted upon with the greater earnestness, because a just and accurate idea of the distinction between LAW and EQUITY is the foundation on which we must build;

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and because Equity is too often misrepresented. No image, indeed, can be less agreeable to truth than the popular image of *Equity*, in which the unlearned admire a benign and liberal arbitress, relaxing the strictness of positive law, and tempering the austerity of the ordinary judge. But the lawyer sees in the Chancery a judicature peculiar in its constitution, adapted to aid the impotency and supply the defect, rather than to mitigate the rigour or contravene the principles of legal jurisdiction. While a court of Law adjudicates *in rem* upon titles completed by actual conveyance, and executes its judgment, a court of Equity adjudicates *in personam* upon the obligations of contract, and decrees a specific performance by the party. The decisions of Equity, so far from fluctuating with individual notions of right and wrong, bow to the authority of precedents and rules, which, like the doctrines of the common law, depend for their just application upon professional knowledge and acuteness. EQUITY would otherwise resolve itself into the discretion of the judge, which an indignant chancellor denounced as the law of tyrants.(*a*) Nay, it would be worse than the worst of recorded tyrannies—a domiciliary inquisition visiting the recesses of every man's conscience, under a specious name, and screened by the veil of technicality from the jealous eye of public opinion. It is said, indeed, that equity is to be dispensed at the discretion of an upright judge, but if it be asked who is the upright judge, the answer must be—*qui consulta patrum, qui leges juraque servat.*(*b*)

Injuries arising to the seigniory from uses.

The king and his sub-lords felt sensibly the deprivation of the valuable fruits of tenure. That change of

(*a*) Fear. Cont. R. 535, n. (*b*) 2 P. Wms. 753.

manners and habits, which excused the personal service of the tenant, whose place in the field was now supplied by the mercenary, sharpened the appetite for pecuniary tribute. It may be asked how uses were calculated to injure the lord, seeing that he had still his tenant in the trustee, who was the legal owner of the land? But the lord could not always discover the legal tenant. The practice obtained of secretly conveying the land to several co-trustees, of whom the intended beneficial owner was commonly one. Richard the Third, while Duke of Gloucester, was joint trustee of numerous estates.(*a*) The beneficial owner continued to possess and enjoy the land as before, so that there was no visible change of ownership. Several statutes (*b*) were ineffectually passed to remedy the mischiefs arising from "privy and unknown feoffments," or "feoffments to persons unknown." Besides, as the land was vested in many legal owners jointly, (whose number might be kept up by repeating the conveyance from time to time,) and as the law carried the entire estate to the survivor, descents were rare, and the lord consequently lost that lucrative incident of tenure—the wardship of infant heirs. And as the *use* was now *aliened* instead of the *land*, he also lost his fine on alienation. Thus, even the legal tenancy was rendered in a great degree unproductive, while the equitable right was necessarily barren.

(*a*) 1 Rich. 3, c. 5.
(*b*) 1 Rich. 3, c. 1; 11 Hen. 6, c. 5; 1 Heu. 7, c. 1.

CHAPTER III.

OF THE DESIGN AND EFFECTS OF THE STATUTE OF USES.

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THE STATUTE OF USES.

THE inroads which uses had made, and were still making, upon the ancient law of tenure, at length induced the legislature to pass the famous STATUTE OF USES,(a) from which we date a new era in the history of conveyancing. That statute, after setting forth a long catalogue of "inventions," "imaginations," and "practices," whereby "many inconveniences had happened, and daily did increase, among the king's subjects, to their great trouble and unquietness, and to the utter subversion of the ancient common laws of the realm," enacted, "for the extirpating and extinguishment of all such subtle practised abuses," that where any person was or should be seised of land to the use of any other person, the person entitled to the use in equity should be deemed to have a corresponding estate in the land at law.

Its probable design.

The apparent object of the statute was, by turning uses into direct ownerships of the land itself, to prevent the future separation of the beneficial right from the legal estate, and thus to restore, in some degree, the singleness and simplicity of the common law. Lord Coke, however, says,(b) with his characteristic quaintness, that "the makers of the statute at last resolved, that uses were so subtle and perverse, that they could by no policy

(a) 27 Hen. 8, c. 10, s. 1. (b) 1 Co. R. 124, a.

or provision be governed or reformed; and therefore, as a skilful gardener will not cut away the leaves of weeds, but extirpate them by the roots; and as a wise householder will not cover or stir up the fire which is secretly kindled in his own house, but utterly put it out; so the makers of the said statute did not intend to provide a remedy and reformation by the continuance or preservation, but by the extinction and extirpation of uses; and because uses were so subtle and ungovernable, as hath been said, they have, with an indissoluble knot, coupled and married them to the land, which, of all the elements, is the most ponderous and immoveable."

It fell short of its presumable object, but produced important changes.

Whether the statute-makers, blind to the folly of attempting to reimpose upon the people, who had begun to taste of freedom in the enjoyment and disposal of their possessions, the feudal fetters of the ancient law, really aimed, without mitigating the rigour of that law, at the utter annihilation of the whole system of uses, or whether they sought only to bring all interests in land under the cognizance of the courts of law, without disturbing the new modes and forms of disposition which uses had introduced, their elaborate piece of legislation must be pronounced a signal failure. The statute, however, though it miscarried in regard to both these objects, was not inactive, but produced important and lasting results, which, as being of the very essence of the existing system, demand attentive consideration. Of these coming changes, the legislature (which, as the late learned Chief Justice of the King's Bench happily observed, is not *inops consilii*, but rather *magnas inter opes inops*,) had probably no presentiment.

It did not destroy equitable interests, but

The statute did *not* operate to prevent the future existence of equitable rights, as distinct from the legal

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supplied new modes of creating legal estates.

ownership, while it *did* operate to communicate to the legal ownership all the flexible and popular qualities of the use; contributing, therefore, both by its negative and positive effect, to confirm and extend the long-coveted immunity from feudal strictness.

Equitable interests were preserved,—

As the retention of equitable interests determined the character of the future system, we will first advert to the means by which they were preserved.

1. by the exclusion of leaseholds for years from the statute;

1. As to leaseholds for years, they were adjudged to be excluded by the letter of the statute. If land was vested in A. for a term of years, *to the use* of B., the statute was held not to transfer the legal interest in the term to B., because, as it should seem, the statute, when it speaks of persons *seised* to the use of others, must, according to correct technical phraseology, be understood to speak of a *freeholder* who is *seised*, and not of a leaseholder who is merely *possessed*. (*a*) Yet the statute is commonly described as a statute "made for transferring uses into *possession*," or for uniting the *possession* to the use. Another ground assigned is, that before the statute, equity would not have enforced a use in respect of a term of years, (*b*) inasmuch as chattel interests were held in small estimation. As the statute declined, for reasons which have now lost their force, (*c*) to interfere, the term remained in A. at law, and B.'s use underwent no change, except a change of name, for it was now called, in conformity with the style of freehold equitable interests, of which we are about to speak, a *trust*.

2. by its inapplicability to active uses;

2. As to freeholds, uses of a certain description were excluded by their intrinsic nature. The only uses on

(*a*) Gilb. Us. 79; Bac. Us. 42.
(*b*) See Sand. Us. 4th ed. 34.
(*c*) See Sugd. Gilb. Us. 80, n. 7.

which the statute could operate, were passive uses, and resulting uses (*a*) (which, except so far as regards the manner of their creation, may be classed together (*b*))—uses not imposing any duty to be discharged by the legal owner, nor indicating any purpose to be answered by the separation of the legal ownership from the beneficial enjoyment. *Such* equitable interests the legislature unquestionably meant to extirpate. But in regard to active uses, and constructive uses, (*c*) the statute was necessarily inoperative. When the use involves a direction to sell and divide the money, or to pay debts, or to convey to a child when adult, or to reconvey on satisfaction of a mortgage, which may never be satisfied, the very nature of the use would seem to preclude the possibility of its being converted, by force of the statute, into a legal right to the land. For the convenience of carrying such destinations into effect, the legal estate still resided in the trustee, and courts of equity continued to administer the trust;—though it may be matter of speculative inquiry (*d*) whether such was the inevitable result even in regard to uses of that class; or whether legal *powers* over the land exactly commensurate with the scope of the office to be discharged, might not be substituted for the legal estate, or law and equity might not be so far reconciled as to confine the legal dominion of the trustee, which often survives at law the purpose of its creation (rendering a reconveyance necessary,) within the limits of that purpose.

(*a*) *Vide infrà*, "Observations on resulting uses."

(*b*) *Suprà*, 33.

(*c*) *Ib.* 32.

(*d*) *Vide infrà*, "Questions concerning the existing division of the ownership into legal and equitable."

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3. by the construction of the judges, with respect to *a use upon a use.*

3. But the judicature established a yet more extensive and important exception, by the rigid construction put upon the language of the party declaring the use. The statute aimed at rendering uses innoxious, by turning the use into a legal estate—the confidence in the person into a direct right to the land. It annexes to the use the actual possession of the subject; not prohibiting the creation of uses, but only acting upon the use when created. Now the judges thought fit to determine that if A., the legal owner of the land, is directed to hold, or contracts to hold, the land to the use of B., who at the same time is directed to hold, or contracts to hold it, to the use of C., the statute will carry the land to B. at law, but carry it no further, leaving C., for whom the use or benefit is really designed, to enforce his right to a conveyance, and an account of the profits, by a suit in equity against B., with whom the legal possession rests. The ultimate use in favor of C. is said to be a use *upon* a use, which the statute, having exhausted itself in the extraordinary effort of communicating the properties of a legal estate to the use in favour of B., has not remaining energy enough to reach.

Effect of that construction in creating trusts.

Hence the distinction between the legal and equitable ownership is still maintained in all its vigour. In order to create, since the passing of the statute, an interest purely equitable, nothing more is necessary than to declare a second use: the statute has added, as Lord Hardwicke observed, three words (*to the use*) to a conveyance. Suppose that A., for example, sells land to B., who desires to have the legal estate vested in his confidential friend C., the object is effected either by A.'s conveying the land to C., to the use of C., to the use of (or, as we now express it, *in trust for*) B.; or by A.'s

contracting (i.e. by bargain and sale) to hold it to the use of C., to the use of (i.e. in trust for) B. In the former case, where there is an actual conveyance, the land passes by it, under the old law, to C., and the use being also declared in favour of C., the statute (according to the above construction of it) declines to transfer the possession from C. to B.; while in the latter case, where there is a contract, without any conveyance at law, the statute operates to convey the land to C., but, in like manner, declines to pass it on from C. to B. The substantial use, thus arbitrarily excluded from the pale of the law, in deference to an idle form of words, was once more received into the bosom of equity. There B. was acknowledged as the rightful owner.

So that, by a very ready process, the legal estate may still be separated from the equitable or beneficial right. The *things* remain; the *terms* only are somewhat changed. The primary use, on which the statute *does* operate, retains, along with its new character of a legal estate, its ancient appellation of a USE; but the secondary use, on which the statute does *not* operate, is called, for distinction's sake, a TRUST.

Condition of uses since the statute.

As the principal operations of modern conveyancing, so far as it concerns freehold estates, are accomplished through the agency of uses, it is necessary to give them, at this stage of their progress, a patient examination, from which it will appear that, in consequence of the above determination relative to a use upon a use, they underwent a remarkable change, with respect not only to their final condition under the statute, but to their incipient condition under the instrument creating them.

Effect of the doctrine relative to *a use upon a*

That the construction thus adopted, though it may be agreeable to the strictness of legal interpretation, mocked

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use, in depriving uses of their beneficial character.

the reason and spirit of the statute, is apparent when we consider that, if, before the statute, upon a purchase of land by A., the conveyance had been made unto, and to the use of B., to the use of A., or unto B., to the use of C., to the use of A., neither B., in the first case, nor C., in the second, would have taken the beneficial interest, (i. e, the *use*,) which, being manifestly designed for A., the purchaser, would have vested in him, while the legal estate would have resided in B. As there existed no *third* species of ownership—the legal estate and beneficial right constituting the entire property—and as C., in the second case, was not destined either to possess the land, or to enjoy the usufruct, he would, before the statute, have taken *nothing*. So when, at this day, the legal estate is fixed in B., in trust for C., in trust for A., equity regards C. as a cipher, and A. as the true object of the trust, on the very same principles which, before the statute, would have induced equity to give him the use. Yet, strange to say, a statute passed for clothing *uses* with the legal dominion is made to confer that dominion, in the first example, on B., who has *no* use, and, in the second example, on C., who has not a shadow of either *use* or *estate*. To point the argument—on what was the statute meant to operate?—USES. What were uses?—*beneficial* rights. Has B. or C. any beneficial right?—clearly not. Does the statute operate in their favour?—we have seen that it does. Why so?—because the law affirms that the use is limited to them. But does equity permit them to enjoy beneficially?—no: equity affirms that the usufruct belongs to A. Then it follows that the law, in quest of something which on examination proves to be really nothing, misses the substantial use at

which the legislature aimed, and that law and equity palpably contradict each other.

Uses and trusts may be created by any form of words.

Neither before nor after the statute was there any magic in the word USE. Before the statute, the sole question was, to whom, in point af conscience, the beneficial right belonged. That right, and the use, were convertible terms. The word *use*, although commonly employed to describe the equitable interest, was by no means necessary to create it. The use arose without any declaration where it was equitable that it should arise; it could not be raised by the clearest declaration where it was inequitable that it should arise. Equity would have been set aside if technical forms had been deemed of higher moment than good faith, and mere words stronger than conscience. Thus, if A., for a valuable consideration paid by B., conveyed land to C., without declaring any use, a constructive use arose in favour of B. On the other hand, if C. afterwards conveyed the land expressly to the use of a purchaser, who bought with notice of B.'s equitable right, no use arose in favour of that purchaser. So, after the statute, it was deemed equally unessential to pursue any particular form of words in order to create a use on which the statute would operate. Whether the land be conveyed to A., to the use of B., to the use of C.; or to A., in trust for B., in trust for C.; or, even to A., in trust for B., to the use of C.;—it matters not: the result in each instance is the same. B., who, before the statute, would, as we have seen, have taken nothing, becomes, by force of the statute, legal owner of the land, while the beneficial enjoyment belongs to C. Hence a *trust* in name may be a *use* in effect, and *e converso*. As the legal expounders of the statute were, therefore, equally indifferent to *words* and *things*—to the fact that

How a limitation is ascertained to be a use within the statute.

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no benefit is designed for B., and to the form of limitation—the student will be apt to ask, by what criterion they proposed to ascertain the existence of the use,—a matter not to be judged of either by substance or by sign? The truth is, that they read *short*, stopping at the limitation to B., and not recollecting that all the words of a sentence cannot be delivered at once. They saw, first, a conveyance of the land to A., then, a limitation to B., which must be a use or nothing, and without patiently waiting the result of the completed sentence, which would have made it apparent that the limitation to him *was* nothing, (the use being really designed for C.,) they invested this shadow of equity with the legal substance.

Uses beneficial, uses not beneficial, and trusts, distinguished.

In order, therefore, to understand the phenomena exhibited by modern titles, we must consider the property in land as having, with reference to the modifications of which it is susceptible, a quadruple aspect, presenting, first, the primitive common law estate; secondly, proper uses, (i. e. beneficial interests; designedly within the statute;) thirdly, improper uses, (i. e. *forms* of beneficial interests, constructively within the statute;) and, fourthly, trusts, (i. e. beneficial interests, neither recognized by the common law, nor reached by the statute.) Where land is conveyed by feoffment or other common law assurance to A., to the use of B. a purchaser, A. has the common law estate, and B. has the proper or *beneficial* use, that is, the very use contemplated by the framers of the statute. Where land is so conveyed to A., to the use of B., to the use of C. a purchaser, A. has the common law estate, B. has the improper or *nominal* use, not contemplated by the framers of the statute, but generated by the conceit of its expounders, and, finally, C. has the

On limiting a use not beneficial, a trust arises.

trust or equitable right. The necessary consequence of limiting a use *not* beneficial, is to create a trust; for the taker of such a use, having no right to hold for his own benefit, must of course hold as a trustee for some other person.

Uses have lost their equitable character, and assumed a legal character.

The use, whether beneficial or not, has ceased to rest on personal confidence, and has, under the influence of the statute, become to all intents a legal right to which the possession is joined. Consequently, where land is conveyed to A., to uses, it is no longer possible that any act to be done by him, as, for instance, his conveyance to a purchaser without notice, can defeat the uses, because the conveyance to A. is no sooner completed than the uses are converted into permanent legal rights, differing from similar interests of common law origin only in the mode and form of their creation and limitation. The effect of the statute upon beneficial uses, and upon uses not beneficial, is the same:—all uses are regarded by courts of law with an equal eye. The legal judge never inquires whether the person to whom the use is limited has any beneficial right or not—an inquiry proper to another jurisdiction. Hence since the statute, uses prove nothing in regard to the beneficial ownership, but are merely the moulds by means of which the legal ownership may be cast with facility into almost any given form. Although fashioned after uses before the statute, they may be as destitute of the equitable principle as their prototypes were always destitute of the legal possession. If the person taking the use be also entitled to the beneficial enjoyment, he becomes legal owner for his *own* benefit; if not, he becomes legal owner in trust for the person so entitled. As the beneficial interest is no longer of the essence of a use, it follows, that uses may be created as

Immaterial at law whether the object of the use be designed to take beneficially or not.

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well by a person who has the legal ownership without the beneficial interest, as by a person in whom these are united. So that when a mere trustee of the legal ownership, without the consent of the beneficial owner, conveys to uses, such uses, even though unsupported by any consideration, or limited to persons having full notice of the trust, confer legal interests by force of the statute; yet it is clear that, under similar circumstances, they could not have been sustained as uses before the statute.

Alleged inapplicability of the statute, where no use would have arisen in equity, denied.

It has been suggested, (*a*) however, that the statute can operate only in those cases in which the uses would have been good as uses in equity before the statute;—a doctrine unquestionably sound in theory, but which, if admitted in practice, would shake the established system of conveyancing to its centre. *Equity* has ceased to be a necessary ingredient in the composition of an use. The legal interpreters of the statute, taking for their guide the narrowest rule of literal construction, referred conscience to the keeping of chancery.

Examination of the doctrine of a *scintilla juris* to feed future and contingent uses.

Until some explanation had been given of the general state of the legal ownership under the statute, it would have been premature to examine another doctrine produced by the judicial glosses upon a very intelligible enactment;—a doctrine which far exceeds in subtlety that of the use upon the use. We read that a certain doctor having challenged the learned world to dispute with him upon any given topic, an English student proposed the question, whether "goods taken in *withernam* are irreplevisable?" (*b*)—a question which, of course, confounded the schoolman. His pride of universal knowledge might

(*a*) Butl. Fearn. C. R. 8th ed. p. 327, n. (*l*).
(*b*) 3 Black. Com. 149, n.

have been yet more effectually put to shame by propounding the point which we are about to discuss.

Future and contingent uses described.

A use may be destined to commence at a future period, as at Christmas next; or to arise upon a dubious event, as A.'s return from Rome; or to arise in favour of a person *to be* born or ascertained, as a future child of A. Inasmuch as a use of this nature is not a present disposition, the statute cannot convert it into a present legal estate in the land. These uses are called future, springing, or contingent. If, *before* the statute, A. had conveyed land to B. in fee, to the use of C. for life, and after C.'s death, to the use of his unborn sons for life or in tail, and, subject to those uses, to the use of D. and his heirs, it is clear that the whole use, or beneficial interest, would have been divided between C. and D. till the birth of a son, which event would have drawn away from D. so much of the use or benefit as was designed for the son.

—how they took effect before the statute.

Now, *after* the statute, which attracts the land in the direction of the use, it may be imagined that the legal estate would pursue exactly the same course—that, until a son came into existence, C. and D. would be the owners of the whole legal estate, which, on the birth of a son, would, to the extent of his interest, move to him from D., in whom it vested subject to be so partially divested. But this, it seems, was far too simple and intelligible an explanation; opposite theories were broached, and warm disputes arose—disputes which appear less justly referable to a laudable zeal for principle and consistency, than to a perverse desire that the imputation of craft and cunning, by which uses before the statute were sought to be discredited, should deservedly attach to their new condition. The difficulty started was upon the letter of the statute, which applies in terms only to a case *where*

—difficulties concerning them after the statute.

CHAP. III. *one person is seised to the use of another person.* But how, at the time of the conveyance, in the last example, could B. (it was asked) be seised to the use of a non-existing son?—and how, after the conveyance, when, by the operation of the statute, C. and D. had become seised between them of the whole estate in the land, could B. continue to be seised at all? Instead of the solution which plain reason suggests, and which regards the seisin of D. as a *qualified* seisin, liable to give place to and admit the future son—some of the judges "struck out new sparkles of their own." They held that the words of the statute would be best satisfied by a FICTION; by holding that, although C. and D. had the whole estate till the birth of a son, yet B. had a *possibility* of regaining, in that event, (they did not show by what magic,) a momentary seisin to the use of the son. To this possibility they gave the mysterious Latin appellation of *scintilla juris et tituli;* apprehending, probably, that *a spark of right and title* would kindle no future controversies among the learned. Westminster Hall resounded with the debate:—the speeches of the eleven judges, who delivered their opinions *seriatim,* occupied six days. (*a*) The Lord Chief Justice Popham declared that not to cherish the *scintilla* would be "to cast the whole commonwealth into a sea of troubles, and endanger it with utter confusion and drowning." The commonwealth had little to fear, but common sense was in imminent danger of perishing between the conflicting elements of fire and water. The *scintilla* has learned advocates (*b*) and opponents (*c*) to this hour; yet the pro-

(*a*) Chudleigh's Case, 1 Co. R. 120, a; *S. C.* Poph. 70; 1 And. 309.

(*b*) Sand. Us. 4th ed. 110. (*c*) Sugd. Pow. S. 3.

fession, by a sort of tacit convention, seems to treat the point as purely speculative.

Arguments against the *scintilla* doctrine.

But dropping down from the sublime metaphysics of the law, let us try the matter by the test of facts and principles familiarly known and understood. When A. makes a conveyance to B. in fee, to the use of C. for life, and, after C.'s death, to the use of his unborn sons for life or in tail, and, subject to those uses, to the use of D. in fee, we know practically that B. ceases, ere the wax is stiff, to have any concern with the land, which, passing through him with the swiftness of the electric fluid, leaves no *scintilla* behind. He is, in fact, a mere conductor. Now what is the condition of the contingent use limited to the unborn sons? In treating of uses before the statute, we have shown that B., who would then have continued the legal owner, *might*, by conveying to a purchaser without notice, have defeated all the uses, which were *personal* confidences reposed in him, but that C. could *not* have defeated the uses limited to his unborn sons. Now, since the statute, as we also know practically, the right of the unborn sons is so knit to the *land* that no disposition to be made by B. or D. before the birth of a son can prevent a son, afterwards coming into existence, from taking the interest destined for him; while it is equally certain that C., the tenant for life, *may*, by destroying his life estate, defeat the right of his unborn sons. The inference is plain—the destination in favour of the unborn sons has lost its primitive character of a *use;* for retaining that character, it would necessarily be affected by the acts of B. or D. (in the one or the other of whom the land must reside till the birth of a son,) and unaffected by the act of C. But it cannot have lost its original character unless it has acquired a legal character,

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which, again, it cannot have acquired otherwise than by means of the statute. It must either be a use conditioned as uses before the statute were conditioned, or a legal interest in the land under the statute. There is no intermediate state. The statute makes no alteration in the condition of the use, short of the superinduction of the legal estate. Then are we not compelled to regard the use as having instantly put on a legal character? The deed, in truth, was no sooner executed than the statute imbued the use with legal qualities, converting it into a *contingent remainder*. When land is conveyed to uses, all the present uses (i. e. uses in favour of objects ascertained) are converted into legal *estates*, and all the future and contingent uses (i. e. uses in favour of objects *to be* ascertained) are converted into legal *rights*, capable in due time of ripening into *estates*. As a conveyance, before the statute, from A. to B. to the use of C. for life, and after his death to the use of his unborn sons, would, in respect of the disposition in favour of the sons, have presently charged the *person* of B. with a contingent *equitable* right, so the like conveyance, since the statute, will, in respect of the same disposition, aided by the operation of the statute, presently charge the *land* with a contingent *legal* right. And this legal right will correspond, and, indeed, be identical with that which arises upon a direct conveyance at common law by A. to C. for life, and after C.'s death to his unborn sons. In both cases the disposition in favour of the sons will be a legal contingent remainder. Then, take the case of a shifting destination, valid in equity, before the statute, but inadmissible at the common law:—for example, a limitation to the use of A. in fee, and if a given event shall happen, then to the use of B. Here, since the statute, the whole

Contingent and future uses are turned by the statute, on their creation, into legal rights.

legal estate is immediately vested in A., subject to the contingent legal right of B. to the possession of the land on the happening of the given event;—just that species of right which, *if* the common law permitted shifting destinations by conveyance *inter vivos*, B. would take under a direct conveyance to A. in fee, and on a given event to B., and which, as the common law *does* permit shifting destinations by will, B. actually takes under a direct *devise* to the same effect. This reasoning, instead of amusing the enquirer with doubtful glimpses of the *scintilla*, follows the light of acknowledged principles, which at once dispel the mist, and conduct him to a sound conclusion. We no longer need even the possibility of any lurking energy in the feoffee or re-lessee, who, according to the *scintilla* doctrine,

> ——— carries *seisin* as the flint bears fire,
> Which, much enforced, shows a hasty spark,
> And strait is cold again.

The arguments against the *scintilla* may be comprised in a few words, by observing that it is gratuitous and superfluous; that the statute law affords no hint of it, while to the common law it was utterly unknown; that if it be indeed an interest, however fitful and evanescent, in the land, it must have some ascertained properties, and confer some definite rights, which yet no one pretends to have detected; and, finally, that a doctrine which exerts no practical influence, has, in truth, no legal existence.

POWERS of appointing and revoking uses.

The owner may either fix the uses by the conveyance itself, or reserve to himself, or confer upon another person, the power of declaring them. As well uses declared by the conveyance, as uses subsequently declared under a power contained in the conveyance, may be revoked or

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varied from time to time by force of the original power, or of a derivative power. Thus, if A. conveys to B., to such uses as A., the grantor, or as C., a stranger, shall appoint, and for want of appointment, to the use of D.;—in the former case A., in the latter C., may appoint the use to E., reserving at the same time a power of declaring new uses, under which power A. or C. may appoint the use to F. In the preceding example, the use in favour of D. will be superseded by the use appointed to E., whose use, again, will give place to the use appointed to F. As, before the statute, B., to whom the conveyance is made, would have been bound to dispose of the land for the benefit of the person to whom the use is for the time being directed, so the statute imbues the use, through every change of its destination, with the quality of a legal estate. When uses are limited to arise from the volition of a person to whom a bare authority is delegated to declare them, the limitation is called, for distinction's sake, a POWER; that person is called the *donee* of the power, and his declaration is called an *appointment*. Such uses, however, are not essentially different from the contingent or shifting uses already described; for as a use in favour of the unborn children of A. depends for its taking effect on the happening of an event, viz. the birth of a child of A.; so, the use to arise under a power of appointing by deed depends, in like manner, on the performance of an act, viz. the execution of the instrument prescribed; and the difference between the cases so put, is at most a difference only in terms. Through the machinery of powers, (keeping within the rule against perpetuities, (*a*)) the legal ownership may be infinitely shifted and modified, and *that* by almost any

—not distinguishable from contingent and future uses.

(*a*) *Vide infrà*, Chap. IV.

means, formal or informal, which the donor of the power shall declare sufficient to indicate the volition of the donee. An agency of this nature was of course incompatible with the principles of the common law; but powers are now very extensively employed, particularly in settlements, to enable tenants for life, trustees, and others, to make leases, jointures, sales and exchanges, or otherwise act upon the ownership at law, either without possessing the legal interest to an extent commensurate with the purposes to be fulfilled, or without possessing any legal interest whatever. Thus A. conveys land to B. in fee, to the use of C. for life, with ulterior limitations, and empowers C., the tenant for life, to lease for 21 years, and empowers D., a stranger, taking no interest in the land, to make an absolute sale: now when C. makes a lease for 21 years, or D. sells the fee, according to the power, the conveyance by A. to B. is thenceforth considered as made to the use of the lessee or purchaser, which use the statute instantly converts into a legal ownership. C., who made the lease, had no interest in the land beyond his own life, yet his lease endures for 21 years certain; D., who sold the estate, had no interest whatever, yet his alienation confers a title to the fee: because, in each case, the disposition founds itself, not on the ownership of the lessor or vendor, but on the use springing, at his appointment, from the original conveyance to B.

The statute ameliorated the condition of the legal ownership.

It must be manifest, from what has already been said, that the condition of the legal ownership was greatly ameliorated by the statute. The common law, with its strait-laced maxims and ceremonious dispositions, remained, and still, for the most part, remains; but on these were superinduced certain properties before pecu-

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liar to the equitable right. For the statute, by turning the use into a legal estate in the land, did, in effect, empower the owner to deal with the *land* at law as freely as he might have dealt with the *use* in equity. This led to an important change in the modifications of the legal ownership. We have seen that uses possessed an adaptive faculty very convenient for the purposes of alienation and settlement, but repugnant to the letter and spirit of the common law. For *that* law forbad shifting destinations, as, a limitation to A. for life, defeasible by a limitation over, on B.'s return from Rome in A.'s life-time; or, a limitation of the fee to the infant child of A., defeasible by a limitation over, on the death of such child under twenty-one; and it equally abhorred a *future* destination, as, a substantive gift by A. to B. from Christmas next, or by A. to the unborn children of B., leaving the estate in A. the donor, until Christmas, or until the birth of a child of B. But the statute, by joining the land to the use, supplied a ready method of effecting, even at law, these and other irregular destinations. A use being moulded to the form required, the statute gives it legal body and substance. So that the legislature, in attempting to restore the fruits of seigniory to the lord, subdued, in a great measure, the stubborn qualities of the legal dominion to the convenience, and even caprice, of the proprietor; and thus, the statute of uses, although professedly made for the advantage of the crown, conferred a signal boon upon the subject.

Dispositions void at the common law, good by way of use.

Still, however, the old leaven of the feudal tenures continues to infect the ownership at law. A legal estate for life, created by way of use, is liable to forfeiture; and whenever a use of the freehold or fee is limited to take effect in remainder, expectant upon a prior use of the

But legal estates created by way of use are subject to the rules of tenure.

freehold, the law requires the limitation to be in readiness to come into operation at the very moment when the right to the possession under the prior use determines. It follows that, when (for example) land is settled on marriage to the use of A., the husband, for life, and after his death, to the use of the children of the marriage, the provision for the children is liable to be defeated by the forfeiture of A.'s life estate, which may happen either by design or through mere inadvertance. (*a*) So, if the use be limited to A. in fee, the legal ownership which he acquires under the statute is subject to dower and to escheat. (*b*) In short, the possession which the use draws after it, is generally, though not invariably, (*c*) attended with the incidents, and amenable to the rules of the common law. The force of the statute has been exerted chiefly in multiplying and enlarging the means of conferring the legal dominion.

Modes of conveyance after the statute of uses,

We now proceed to consider what changes the statute produced in the modes of conveyance.

BARGAINS AND SALES,

BARGAINS AND SALES, which, before the statute, were substantial dispositions of the equitable ownership, raising a use in favour of the purchaser on the ground of a valuable consideration paid by him, are now resorted to merely as instruments for raising such a use as will attract the statute; but to the raising of which, (since uses have passed into mere forms of legal limitation,) neither any beneficial interest in the bargainor, nor any consideration really valuable, and actually moving from the bargainee, is requisite. When, therefore, A. the legal owner, holding either in his own right, or as a mere

(*a*) *Vide suprà*, 9 & 20. (*b*) *Sed vide infrà*, Chap. V.

(*c*) The doctrine of *remitter* is an exception, see Co. Litt. 348, *b.*; Doe d. Cooper v. Finch, 1 Nev. & Man. 172, n. (86); 4 Bar. & Ad. 288.

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trustee for B., bargains and sells to C. for five shillings expressed to be paid by C. to A. (*a*), (the semblance of value and of payment being still requisite,) there arises in favour of C. such a use as satisfies the statute, or at least its expounders, and consequently C. is immediately invested with the legal estate. The practice of expressing (for the money is never paid) a *nominal* consideration of five or ten shillings in deeds has been extended, without regard to its origin and use, to every kind of transfer of every species of property.

COVENANTS TO STAND SEISED,

As to COVENANTS TO STAND SEISED, the same consideration of blood or marriage, which was necessary to raise the use before the statute, is necessary still; but no beneficial interest in the covenantor is required, for if he have the legal ownership, though merely as a trustee, the use will spring up, and the possession follows.

—both became legal conveyances.

In short, bargains and sales, and covenants to stand seised, which, before the statute, were real contracts passing the beneficial interest, are now employed, without regard to that interest, as technical vehicles for conveying the land at law. The statute has had the effect of adding the forms of such contracts to the list of legal assurances. Of the practical importance of the conveyance by bargain and sale we shall presently speak. Covenants to stand seised have fallen into neglect, for, as no use can arise upon such covenants in favour of any person who is a stranger both to the marriage contract and to the blood of the covenantor, they are incapable of adaptation to the purposes of a modern settlement, which requires, not only the limitation of legal interests to

(*a*) It is conceived that a bargain and sale by A. to B., in consideration of money or money's worth *paid by C. to D.*, would be good.

trustees for raising jointures, portions, &c., but also the insertion of powers of appointing uses to lessees, purchasers, and others.

Distinction between such conveyances as operate by, and such as operate without transmutation of possession.

It has already been observed that, before the statute, uses were created either by changing the possession, as when A., conveyed the land to B., to the use of C.; or, without changing the possession, as when A. bargained and sold, or covenanted to stand seised of, the land to the use of C. And, since the statute, legal conveyances are divided into those which take effect by transmutation of possession, and those which owe their operation exclusively to the doctrine of uses. The bargain and sale, and the covenant to stand seised, which do not affect to change the possession, and which, therefore, before the statute, had no operation at law, now convey the land itself by force of the statute. To illustrate the distinction between the two classes of assurances—upon a bargain and sale made since the statute by A. to B., nothing passes under the *bargain and sale* but the *use*;—it is the *statute* which transfers to B. the *possession* of the land. But if A. conveys the land by feoffment to C., to the use of B., then the *conveyance* transfers the possession to C., from whom the statute passes it, in the same instant, to B.

STATUTE OF INROLMENTS.

The legislature, observing that a mere contract for sale, value being given, raised a use, and, with the help of the statute, operated to change the possession, and, consequently, apprehending that land would be conveyed from man to man, without form or solemnity, passed another statute, the STATUTE OF INROLMENTS,(*a*) which denied effect at law to such contracts in regard to *freehold* interests, unless made by deed, (*b*) indented, and inrolled within six [lunar] months from the date. A contract for

—confined to bargains and sales of freehold interests.

(*a*) 27 Hen. 8, c. 16. (*b*) i. e. a writing under seal.

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the sale of land so perfected is known by the name of a BARGAIN AND SALE INROLLED.

—evaded by the modern LEASE AND RELEASE.

Conveyances by way of bargain and sale being thus clogged with the ceremony of inrolment, and being on other accounts unfit for general adoption, the lawyers again taxed their ingenuity, and again outwitted the collective wisdom of the legislature. They quickly perceived a loophole which the statute of inrolments had left open, and through which almost all the land in the kingdom has since passed in secrecy and silence. That statute does not extend to a contract for the sale of a *term of years*. If, therefore, A. wishes to convey the inheritance of the land to B., he first contracts for a nominal consideration, as, five shillings, to sell it to B. for a year. This contract entitles B. to the use for a year, which use the statute of uses immediately turns into a legal estate in the land, so that B. becomes, without entry, tenant in possession to A., whose remaining interest in the land (technically the *reversion*) may, upon the principles of the ancient common law, (*a*) be relinquished (technically *released*) to B. by another instrument, the very next moment. The first instrument is called a *Bargain and Sale for a Year*, or a *Lease for a Year;* the second, a *Release:*—they form together the conveyance now in general use under the name of a LEASE AND RELEASE.

Practical use of the bargain and sale, and the lease and release.

By a *bargain and sale*, singly, an estate to endure for one year, or for one thousand years, and by the joint result of a bargain and sale and a release of the reversion, (i. e. a *lease and release*,) an estate of freehold or inheritance, may be conveyed, and completely vested at law in the grantee, without entry upon the land, livery

(*a*) *Vide suprà*, p. 19.

of the possession, or inrolment. By means of the former assurance (the bargain and sale), all the purposes of mortgaging or incumbering the land, (a long term of years, if without impeachment of waste, being of little less value than the fee simple,)—and by means of the latter (the lease and release), all the purposes of alienation and settlement may be accomplished, without any other ceremony than the sealing and delivery of the parchment, and without the risk of disclosure.

Publicity would not have resulted from the inrolment of bargains and sales for years;

If, indeed, the statute of inrolments *had* extended to instruments creating estates for years, still its policy might and probably would have been in a great measure disappointed, by first making and inrolling a bargain and sale for a year, and then, by another deed *not* inrolled, releasing to the lessee (already in possession under the bargain and sale, aided by the statute of uses,) the reversionary interest in the land. As the bargain and sale for a year discloses nothing but the subject-matter of the sale, (which, indeed, it does not necessarily disclose,) and the names of the legal grantor and grantee, (neither of whom may have any beneficial interest,) the nature and extent of the rights created by the conveyance would still have lain concealed in the unrecorded release. It would seem, therefore, that the mere extension of the statute of inrolments to bargains and sales for years would not, as some writers assume, have had the effect of registering the titles to real property. Nor does experience warrant the supposition, that the legislature, if so disposed, could even by a series of well-directed attacks eradicate the long cherished (*a*) practice of secret alienation, much less change, by a single enactment, the habits of a people.

(*a*) *Vide suprà*, 37.

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—nor from the solemnities of common law assurances.

Besides, the various common law assurances—feoffments, leases, releases, grants, fines, and recoveries—were left untouched. It seems, indeed, to have been considered that the solemnities which attended those assurances afforded sufficient protection against secrecy and fraud. But solemnities instituted, in a semi-barbarous age, to promulgate changes in the relation of lord and vassal, were but ill suited to the protection of purchasers and lenders in the altered condition of society. How inadequate are livery, entry, attornment, and other forms of that nature, to make known even the fact of transfer among a busy commercial people, and how absolutely worthless for the purpose of conveying information relative to the state of the ownership? The disuse of such forms, while it facilitated dealings with land, deducted little from the safety of titles. At this day, a conveyance by feoffment, so far at least as regards the contents of the parchment declaratory of the interests intended to be created, may be made with as much privacy as even a conveyance by the modern lease and release. After attornment was taken away by the statute of Anne,(*a*) persons entitled in remainder or reversion were enabled to convey their interests by a deed of grant unattended by any extrinsic ceremony whatever. And as, in every case where the possession is held by a tenant for life or for years, or even from year to year, the ulterior interest is either a remainder or a reversion, capable of being transferred simply by grant, that clandestine species of conveyance might be adopted in the great majority of transactions. However, the perfect convenience and general applicability of the *lease and release*, recommended and established it as the common assurance of the kingdom.

(*a*) 4 Anne, c. 16, s. 9.

Testamentary power over land conferred by the legislature.

The power of testamentary disposition enjoyed, before the statute, over the use, was extended by the legislature to the land itself, by first rendering lands held under a particular species of tenure devisable, (*a*) and by afterwards reducing (*b*) all freehold lands to that tenure. The right thus wisely conceded by the legislature has been liberally expounded by the judicature. The owner is allowed to effect by a simple expression of intention, unaided by the machinery of uses, all those irregular destinations, which, as tending to suspend or displace the legal tenancy, are interdicted by the rules of the common law;—rules which every owner, however strictly bound to their observance through life, is permitted thus to abrogate in his grave.

TRUSTS, or equitable interests, after the statute.

Let us now direct our attention to TRUSTS, which form at this day so important a division of the law of real property.

—analogous to uses before the statute.

Trusts are, for the most part, in the same plight with uses, as the latter existed before the statute. The trust involves the right in equity to the beneficial enjoyment of the land. The peculiarities already pointed out as characterizing the use before the statute, and distinguishing it from the legal estate in the land, have been transferred to the trust. Since it is material that those peculiarities should be clearly apprehended, it will not be a misapplication of our time to recapitulate them with reference to trusts.

1. Trusts, in regard to the modifications of which the equitable interest admits.

First, In regard to the modifications of which equitable interests are susceptible.—A trust may, of course, be limited for years, for life, in tail, or in fee. Trusts, like uses before the statute, are wholly independent of tenure.

(*a*) 32 Hen. 8, c. 1: 34 Hen. 8, c. 5.
(*b*) 12 Cha. 2, c. 24.

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—unaffected by the rules of tenure.

As they enjoy, therefore, an exemption from the common law liability to forfeiture, (forfeiture being a punishment for acting contrary to the fidelity due to the person of whom the estate is holden, whereas a trust is holden of nobody (*a*);) it follows that, when a trust is raised in favour of A. for life, and after his death in favour of his children, no act done by A., before the birth of a child, can defeat the destination in favour of his children. By the exclusion of the rules of tenure full scope is allowed to shifting and to future trusts. Thus, when a trust is raised in favour of A. in fee, with a declaration that if B. shall pay to A. a sum of money, the trust for A. shall cease, and the land be held in trust for B. in fee, the equitable interest in the fee shifts to B. on payment of the money. So, a substantive trust for A. from Christmas next, or for the unborn child of A. is valid. Similar results might, as we have seen, have been obtained by means of uses before the statute, though till the introduction of uses shifting and future dispositions were totally unknown.

2. Trusts, in regard to their qualities and incidents,

—bind volunteers, but not purchasers without notice.

Secondly, As to the qualities and incidents of equitable interests.—The trust, still conforming itself to the use before the statute, follows the land, or rather the person of the legal owner in respect of the land, while the legal owner, taking the estate, either with knowledge of the trust, or by devolution of law, or by voluntary donation, succeeds, expressly or in contemplation of equity, to the confidence reposed in the original trustee. But if the legal owner conveys for value to a purchaser ignorant of the trust, the identical land is lost to the equitable owner, who is left to seek redress by bill in Chancery for the breach of trust.

(*a*) Gilb. Us. 39.

It is a maxim of equity that a trust shall not fail for want of a trustee, for the Keeper of the Great Seal is himself the ultimate trustee. Hence the student may be apt to infer that equitable interests are at this day rights inherent in the land itself. This maxim, however, will be found perfectly consistent with the principle that an equitable interest is not a right annexed to the land, but merely a remedy against the person; for its real import is no more than this—when a trust is created, and no trustee is appointed to execute it, or the trustee refuses the office, equity considers every person who takes an interest in the land at law, with a conscience affected by notice, express or constructive, as bound, in respect of such interest, to afford the legal means of discharging the trust. But when such a taker conveys to a purchaser for value without notice, equity would sin against its own principles by attempting to follow the land into the hands of the innocent holder, and, therefore, can only visit upon the fraudulent seller the loss sustained by the beneficial claimant.

Rule of equity, that a trust shall not fail for want of a trustee, reconciled with the personal nature of a trust.

If the fee was vested in A. in trust for B., and A. died without an heir, the land escheated to the lord, who, it should seem, (*a*) was not bound by the trust. (*b*) But the law on this point has been altered by a recent statute. (*c*)

Trusts not binding upon the lord.

The interest of a person entitled to the benefit of a use before the statute was not, as we have seen, liable

—forfeitable for treason,

(*a*) Sugd. Gilb. Us. 17, n. 10. But when the land so escheated to the king, a crown grant might be obtained by the beneficial owner. 39 & 40 Geo. 3, c. 88; 47 Geo. 3, sess. 2, c. 14; 59 Geo. 3, c. 94. As to leaseholds, see 6 Geo. 4, c. 17.

(*b*) 3 & 4 Wm. 4, c. 131.

(*c*) 4 & 5 Wm. 4, c. 23. *Vide infrà*, chap. V.

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to any species of forfeiture, but the legislature (*a*) subjected trusts and equities of redemption to forfeiture for treason.

—subject to curtesy, but not to dower.

The husband of a proprietor of the equitable inheritance is entitled to a beneficial interest corresponding with the estate of a legal tenant by the curtesy, but the wife of a proprietor of the equitable inheritance was not, till another recent statute (*b*) interposed, entitled to a beneficial interest in the nature of dower. This is admitted to have been an anomaly. Perhaps, however, the error lay rather in the admission of curtesy than the exclusion of dower, for both curtesy and dower are properly common law incidents flowing from tenure.

—protected in equity against dower attaching on the legal inheritance of the trustee.

As well before as after the statute of uses, the land was liable, in the hands of a person holding the legal ownership in trust for another, to the dower of the trustee's wife, and to other legal burthens; but equity interposes to protect the beneficial ownership. So, the wife of a mere mortgagee of the legal fee is dowable at law, but equity will not permit the assertion of her legal right.

—how far governed by analogy to legal rules.

Trusts, like uses before the statute, pursue the course of succession appointed for legal interests of a corresponding description. They are expounded too by analogy to the rules of legal construction. But those rules do not always govern in equity with absolute sway. The rule, for example, which requires the word *heirs* to pass the fee in a conveyance at common law, although it has been extended to uses within the statute, is not rigidly applied to trusts. If land is limited expressly in trust for A., without any other indication of an intention to benefit A. than that which results from the trust itself,

(*a*) 33 Hen. 8, c. 20.

(*b*) 3 & 4 Will. 4, c. 131. *Vide infrà*, chap. V.

equity, in conformity to the rule of law, gives to A. the beneficial interest for life only; but if it can be collected from the instrument that A. was meant to have the absolute interest, equity, esteeming the intention more than the rule, gives him the beneficial fee without the word *heirs*. So, the contract of an owner in fee to sell the land to A., operates in equity, from the nature of the transaction, as a valid disposition of the fee without the word *heirs*. Law and Equity run parallel courses, so long as legal and equitable ownerships may, without injustice or absurdity, be subjected to the same rules; diverging at the point where the legal substance, and the abstract personal right, become incapable of rational assimilation. With those forms and doctrines which are founded on the corporal possession, tradition, or tenure of the land itself, (as, livery, forfeiture, escheat,) equity cannot possibly be conversant. To attempt the extension of such doctrines and forms to trusts, on the ground of *analogy*, would be to pervert the term, and to destroy, in seeking to promote, the harmony of the system.

—form a system more distinct than uses before the statute.

Under the modern system of trusts, the equitable interest has obtained a yet more complete exemption from the control of the common law judge, than it ever enjoyed while existing in the shape of the ancient use, which, by the operation of several statutes (*a*) directed against uses, was brought within his occasional cognizance.

3. Trusts, in regard to their creation and transfer. May be created and transferred without formality.

Thirdly, As to the creation and transfer of equitable interests.—To the express creation of a trust, or the transfer from man to man of the benefit of an existing trust, nothing more is necessary than a manifestation of

(*a*) *Suprà*, 37. So, by the statute of frauds, 29 Cha. 2, c. 3, s. 10, trust estates are made liable to execution upon a judgment; and trusts of the fee are made assets by descent.

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the intention, which may be indicated by any form of words. The statute of frauds (*a*) requires writing, but no statute, rule, or principle, has prescribed any other solemnity or observance; and the very idea of a trust, which has nothing real or tangible in its nature, seems to repel the notion of a *conveyance*. A contract for the sale of a freehold interest in land, not having the requisites of the statute of inrolments, (*a*) and therefore inoperative to confer any title to the land at law, is nevertheless binding in equity, just as a bargain and sale before the statute of uses was effectual, in whatever form conceived, to create an obligation which the chancery enforced. As the ancient bargain and sale raised a use, so the modern contract for sale raises a trust in favour of the purchaser. In a court of law, which cannot recognize an alienation until perfected by an actual *conveyance*, the only remedy upon such a contract is an action to recover damages for its non-performance, but equity decrees what is called a *specific* performance, obliging the contracting parties to do *in specie* the very thing agreed to be done. Suits for the specific performance of contracts, which necessarily involve the investigation of titles, the taking of accounts, and various other matters, fruitful of nice and difficult questions of law and fact, draw largely upon the time learning and acumen of the equity judge. In truth, all instruments which affect only the equitable or beneficial interest in land—from the equitable right to enjoy the land for ever, down to the equitable right to enjoy it for a year—are in the nature of contracts, or agreements, to be specifically performed in equity. Although agree-

Of contracts for sale and specific performance.

(*a*) *Suprà*, 59.

(*b*) 29 Cha. 2, c. 3, s. 79. Trusts arising by construction, or transferred by operation, of law, are saved by s. 9. And the equitable doctrine, as to the part performance of verbal contracts, has made fresh inroads upon the statute.

ments concerning land which, before the statute of frauds, were valid without writing, are required by that statute to be reduced into writing, and signed by the party to be bound, or by the authorized agent of such party,(*a*) yet such agreements may still be made by any form of words whatever, and they are sometimes implied, in defiance of the statute, from circumstances alone. If, therefore, the fee is vested in A., in trust for B., who sells it to C., either giving C. a written receipt for the purchase money, expressive of the substance of the transaction, or partly performing a mere verbal contract by letting him into possession of the land, C. acquires (the purchase-money being paid) a perfect title to the equitable fee, and may at any time call upon A. for a legal conveyance of the land. But although the conclusion that a contract in any form, or, indeed, mere informality itself, may operate as a valid disposition in equity, appears irresistible upon principle, and although it is obvious that an interest purely equitable, being merely a right against the person of the trustee, cannot become the legitimate subject of a *conveyance*, yet, in practice, the owner of such an interest is made to convey with all the pomp and circumstance proper only to the assurance of a legal proprietor.(*b*)

Practice of conveying equitable interests according to legal forms.

Before we dismiss the subject of trusts, it will be proper to add a few remarks explanatory of the causes to which the existence of trusts merely passive may be traced. We have seen that passive uses were resorted to before the statute of uses, in order to escape from the

Passive trusts—their prevalence at this day referred to several causes, viz.

(*a*) Sect. 4.

(*b*) Thus, after a mortgage of the legal fee, the equity of redemption is conveyed by lease and release; and, even after a contract for the sale of an equitable fee, (which passes by the contract,) the purchase is *completed* by lease and release.

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trammels and hardships of the common law, "the permanent division of property into legal and equitable interests being clearly an invention to lessen the force of some pre-existing law."(*a*) For similar reasons, equitable interests were revived, and have continued to flourish in the form of trusts. The nation, indeed, has long ceased to feel the iron grasp of the military chieftain; the days of chivalry are past; but still legal ownerships are attended with some peculiar inconveniences, the offspring of tenure, —that prolific parent of passive trusts. 1. The liability of a legal estate for life, whether created at common law or by the limitation of a use, to forfeiture, would alone have induced the necessity of making settlements by means of trusts in equity, where no forfeiture can be incurred, if lawyers had not hit upon a device, which we may take this opportunity of explaining. This device, when the use is limited to A. for life, with remainder (*contingent*) to his unborn children, interposes a remainder for the life of A. to trustees, who, on the commission by A. of an act of forfeiture, (*b*) may enter and preserve the possession for the future children. So, when the use is limited to A. for life, with remainder (*contingent*) to the unborn children of B., a mesne remainder to trustees for the life of B. is a necessary outwork to protect the contingent remainder.(*c*) These functionaries, who play a silent and unconscious, though important part, in almost every legal settlement, are called *trustees to preserve contingent remainders*. 2. The right of the wife of a sole owner of the legal inheritance to be endowed of one-third of the land at his death, also gave occasion, and, notwithstanding a recent statute,(*d*)

1.—to the necessity of guarding against forfeiture; and herein of trustees to preserve contingent remainders.

2.—to the desire of preventing dower.

(*a*) Sand. Us. 10, *n*.
(*b*) *Vide infrà*, 78.
(*c*) *Suprà*, 12.
(*d*) *Infrà*, chap. V.

still gives occasion to passive trusts. In order to exclude dower, which, as the wife may refuse to join in a sale, or, if consenting, is incompetent to part with an interest in freehold land otherwise than by means of certain formalities, (heretofore a fine or recovery, but now a deed acknowledged (*a*),) presents an obstacle to alienation, it was usual, and may still be expedient, to lodge a portion of the legal ownership in a trustee. 3. Even since the statute of uses, the equitable interest is, in some respects, more tractable than the legal estate. 4. Again, as leaseholds for years are not affected by the statute of uses, and consequently do not participate in the facilities which it affords for moulding the legal ownership, passive trusts are employed for effecting settlements, and various other dispositions of that species of property. 5. It, moreover, often happens that, from a mistake in framing the instrument, or merely for the greater convenience of framing it, the equitable ownership is divided from the legal. 6. We still more frequently find, that, after the purposes of an active trust have been answered, or have become incapable of effect, the legal ownership is allowed, either from inadvertence, or from the desire of avoiding the expense of a reconveyance, to remain outstanding in the trustee. Hence passive trusts, involving no duty, are so common at this day, that the separation of the legal from the equitable ownership exists, to a greater or a less extent, in almost every title.

3.—to the ductility of trusts.

4.—to the exclusion of leaseholds for years from the statute of uses.

5.—to mistakes in framing, or the convenience of framing the deed.

6.—to the not getting in of satisfied legal estates.

(*a*) *Infrà*, chap. V.

CHAPTER IV.

OF THE GENERAL STATE OF THE LAW OF REAL PROPERTY.

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Practical result of the preceding chapters.

LET us now apply our attention more particularly to the general condition of the law, first endeavouring, though at the risk of repetition, to collect into one point of view the practical result, so far as the disposition of freehold and leasehold property is concerned, of the principles, enactments, and decisions, scattered through the preceding pages.

Importance of distinguishing between the common law, the statute law, and equity.

For this purpose we must carefully distinguish between the Common Law, the Statute Law, and Equity. From inattention to this distribution, the student is very apt to be confounded. He finds it laid down that a certain species of disposition is contrary to law, as, for example, a freehold interest to commence at a future period, or to take effect by displacing a previous interest, or, that certain consequences are inseparable from certain acts, as, for example, forfeiture from a feoffment by which a tenant for life assumes to pass the fee. Yet he knows that such dispositions are often made with effect, and that such acts are not always followed by injurious consequences; indeed, he is familiar at his own desk with the practical use and safety of the very things said to be impossible or dangerous. On reflecting, however, that many things, which cannot be done under the common law, may be done through the medium of uses under the statute, and that many things, which cannot be done in either mode, may be done through the medium of trusts in

equity, the apparent incongruities which clouded his view are dispelled, and the system emerges clear, precise, and harmonious.

As to FREEHOLDS:—Supposing A. to be owner of the legal fee, we proceed to consider, first, under what restrictions he lies at the COMMON LAW. As to FREEHOLDS.

1. He cannot alter his own seisin of the freehold, as, by making himself tenant for life, or tenant jointly with another person, nor alter the descendible qualities of his own inheritance, as, by making himself tenant in tail, without conveying the fee to B. a third person, and taking a reconveyance of the partial or qualified interest —for a conveyance by A. to *himself* for life, or in tail, and then over to B., would be totally void, and a conveyance by A. to himself and B. jointly, or a conveyance by A. to B. for life, or in tail, and afterwards to remain to himself (A.) *in tail*, would be void as to A.; who, in the last example, would not *acquire* a new ownership as a *remainder-man*, but *retain* the remnant of his old inheritance as *reversioner*. Enumeration of objects unattainable at the common law.

2. He cannot vest an interest in his wife (husband and wife being one person in law) without conveying to B., in order that B. may convey to the wife.

3. He cannot convey to B., at the same time postponing B.'s possession, as, to B. from Christmas next, or, from the death of A., leaving the fee in A. till the period shall arrive, or the event shall happen; though he may convey to B. till Christmas next, or during the life of A., and after Christmas next, or the death of A., to C. in fee, because in the latter case there is no suspense of the possession.

4. He cannot so convey as that several persons be-

coming entitled at different periods of time may take as joint-tenants.

5. He cannot convey to an object not in being or not ascertained, as, to an unborn child of B., or to the survivor of B. and C., without giving a prior and immediate freehold interest *less* than the fee to a person in being and ascertained—and, if he limit such an interest, its determination, by the act of God or by the act of law, before the destination over has an existing or ascertained object, will render that destination incapable of effect.

6. He cannot, on conveying to B. an immediate freehold interest *less* than the fee, make a destination over in favour of any person, whether in being and ascertained or not, to take effect in possession at any other period than *instantly* on the determination, by the act of God or by the act of law, of the previous interest of B.

7. He cannot so convey the fee to B. as to render it liable, in any event, or at any period, certain or uncertain, proximate or remote, to shift, wholly or partially, from B. to another person.

8. He cannot, after conveying the fee to B., retain any right of resuming the possession, except such right of re-entry as the law implies for breach of a condition imposed by the conveyance, and which right he (A.) or his heirs alone can enforce; nor can he reserve to himself, or give to any other person, a power of revoking or varying the effect of his conveyance.

These prohibitions, which, in regard to common law conveyances, continue in full force at this day, are, for the most part, so many necessary consequences of the doctrines explained in the first chapter. According to those doctrines, the possession could not be suspended; the ownership could be changed only by a change of the

possession; the possession could not be changed without a *conveyance*, which required livery; a man could not deliver possession to himself, nor, having delivered it to another, recall it.

The same objects shown to be attainable by means of uses under the statute law.

But the various kinds of disposition above enumerated, were clearly admissable as uses in equity before the statute, and when the statute had brought within the pale of law the unorthodox forms of fiduciary interests, they became susceptible of legal effect. Under the common law, aided by the STATUTE LAW, (i. e. the statute of uses acting on the creatures of equity,) all these objects, and many others equally irreconcilable with the rigid principles of tenure, may be accomplished, and *that* by one assurance. Thus A., the supposed owner of the fee, may, by lease and release or feoffment, convey (and, till lately, might, by fine or recovery, have conveyed) the land according to any of the following modes:

1. To B. in fee, *to the use* of himself (A.) for life, or in tail, or to the use of himself (A.) and B. jointly, or to the use of B. for life or in tail, and then to remain to the use of himself (A.) in tail.

2. To B. in fee, to the use of his (A.'s) wife for life, or for any other estate or interest.

3. To B. in fee, to the use of C. from Christmas next, or from the death of A.

4. To B. in fee, to the use of the existing and future children of B. jointly, or to the use of any other class or number of persons jointly, without regard to their being capable of taking together at the same time.

5. To B. in fee, to the use of the unborn children of C., or to the use of the survivor of B. and C., without limiting any previous interest.

6. To B. in fee, to the use of B. for life, and after his

death, and one year, (thus leaving a chasm between the interests of B. and his successor,) to the use of C.

7. To B. in fee, to the use of B. in fee, and if a given event shall happen (as B.'s death without having been married,) then to the use of C.

8. To B. in fee, to the use of B. in fee, and if a given event shall happen, then to the use of himself (A.); or to B. in fee, to any specified uses, subject to a power reserved to himself (A.), or given to C. a stranger, of annulling or altering the uses.

In all these cases, by the simple expedient of vesting the land in another person (B.), and engrafting upon his possession suitable limitations of the use, the intention is fully and at once effected. Although such limitations are conceived in the form of equitable rights, (for upon any other hypothesis they would be void, as contravening the strict rules of the common law,) yet they cannot be said to have even a momentary existence in that state, because the statute instantly draws the possession from B., and transforms those rights into legal interests in the land.

Of certain objects imperfectly attainable either at the common law, or by means of uses under the statute.

Thus, by the co-operation of the common law and the statute of uses, much may be effected, but another agent is still requisite to complete various arrangements of daily occurrence. We have shown, in the preceding chapter, that legal estates created by limiting *uses*, are, notwithstanding their equitable origin, attended, for the most part, with the incidents and consequences of common law estates; nay, that the strict rule of the common law, requiring the word *heirs* to give the fee, is applied to the incipient use. For this reason, among others,

both the common law and statute law are often found wanting, as it happens in the following instances:—

1. If A. conveys to B. in fee, to the use of C. for life, and after C.'s death to the use of his unborn children in tail or in fee, C. may forfeit his life estate, and by that means cause the exclusion of his unborn children.

2. So, if A. conveys to B. in fee to the use of C. in fee, the wife of C. will be dowable out of the land;—but the law upon this point is modified by a recent statute. (*a*)

3. Again, A. cannot charge the land at law with a gross sum of money;—at least, it will be found that legal machinery is but ill adapted to attain the object.

Here neither the common law nor the statute of uses, nor both combined, will suffice. What, then, is our next resource?—EQUITY. As we had before employed the empty forms (*b*) of equity, (statute-uses,) so, still fruitful in expedients, we now call in its living principles.

1. We make A. convey the fee to B., to his (B.'s) own use, but *in trust* for C. for life, and after his death, in trust for his unborn children, in order that the rights of C. and his children, being purely *equitable*, may be exempted from the rules of tenure, and consequently from forfeiture; or, with a view to obviate the inconvenience of vesting the whole legal dominion in B., we make A. convey the fee to B., to the use of C. for life, and on the determination of C.'s life estate, then to the use of B. during C.'s life, in trust for C. and to preserve the subsequent contingent remainders, and after his (C.'s) death, to the use of his children in tail, with remainder to D. in fee. Now, if C. should commit a forfeiture, the legal dominion for the remainder of his life, but no longer,

—but which may be ultimately secured by resorting to trusts in equity.

(*a*) *Vide infrà*, chap. V. (*b*) *Vide suprà*, 46.

CHAP. IV. will belong to B., as a trustee for C., on whose death his (C.'s) children will succeed regularly to the legal ownership. If, indeed, B., the trustee, should also commit a forfeiture, the contingent remainder to the children would be defeated at law, but equity would compel him to make good the loss sustained by the children; nor would any person, deriving title under his malfeasance, and with notice of the trust, be allowed to retain the land against the children.

Here it may be proper to apprise the student that *forfeiture* is not the only mode by which the life estate may be determined before the contingency happens. It is liable to be destroyed by surrender or merger. Thus, if the remainder to the trustees were omitted in the above example, C., by surrendering his life estate to D., before the birth of a child, or C. and D. by jointly conveying even by an innocent assurance, as a lease and release, to a stranger, (in whom the life estate and fee would coalesce,) before the birth of a child, might exclude the contingent remainder. So, if the ultimate fee, (the remainder to the trustees being omitted,) were allowed to result to A. the grantor, as reversioner, instead of being limited away to D., a similar conveyance made by A. and C., before the birth of a child, would produce the same effect. So, again, (the remainder to the trustees being omitted) if that fee were limited to C., the tenant for life, instead of D., then, although C.'s life estate and remainder in fee would not, by force of the limitations *per se*, coalesce, so as to exclude the contingent remainder, yet even an innocent conveyance, subsequently made by C. alone would prevent such remainder from taking effect. In each of these instances, the destruction of the contingent remainder would be the legal

consequence of the absorption of the estate for life in the fee. When we speak of destroying a contingent remainder, we do not, therefore, necessarily contemplate a *tortious* act. The contingent remainder fails on the premature removal, by *any* means, of the supporting freehold.

2. So, on a purchase of the fee, dower is excluded by conveying the fee partly to the purchaser's own use, and partly (i. e. an estate of freehold in remainder,) to the use of another, in trust for him; the wife not being dowable unless the husband has the sole ownership of the legal inheritance, without any interposed estate of freehold. But this point is subject to the qualifications introduced by a recent statute.(*a*)

3. In order to charge the land with a gross sum, A. conveys to B. to his (B.'s) use in fee, or for a long term of years, upon trust to raise the money by sale or mortgage, equity enforcing the trust.

Theory of a conveyance to uses.

These hints, assisted by the lights to be derived from reflecting on the historical sketch presented by the former chapters, will enable an attentive observer to analyze the process of the most complex settlement. He will remark that, although the assurance is begun and ended by the act of sealing and delivering the parchment, yet, attending to the order indicated by the theory of the process, the first step conveys the land to an indifferent person, which, by the joint result of the common law and statute law, may be readily effected in a private chamber; the second step gives effect to the intention at law, so far as it is capable of legal effect, by moulding uses; but where the intention cannot be entirely or securely effected by such means, the third and final step confers the right of enforcing in equity what remains to be done, by the superinduction of trusts.

(*a*) *Vide infrà*, chap. V.

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As to LEASEHOLDS FOR YEARS—terms may be created, but not transferred by means of uses under the statute.

As to LEASEHOLDS FOR YEARS (leaseholds for lives being freehold interests):—The statute of uses has no application to the *transfer*, though it has to the *creation* of chattel interests. When A., the legal owner of a freehold interest, conveys the land to B., *to the use* of C. for a term of years, or makes a bargain and sale of the *use* to C. for a term of years, the statute draws the term out of the freehold interest, and vests it in C. at law. But the statute, having called the term into legal existence, leaves it to the disposal of the common law. If, therefore, C. afterwards transfers his interest to D., *to the use* of F., the legal interest in the term vests in D., while F. takes only an equitable right to the term. The consequence is, that the legal interest in a leasehold for years cannot be transferred, shifted, modified, and varied with the same facility as the legal interest in the freehold. For example, if a lease for years is vested in A., who wishes to vest it in himself jointly with B., then, as A. cannot convey directly to himself, he must assign the lease to a third person, C., who, by another deed, must re-assign it to A. and B.; but if the subject were freehold, A. might convey to B., *to the use* of A. and B., who would at once become joint owners of the legal estate. Again, if A. should wish to make a settlement of the lease, the difficulty of bending the common law to the various purposes of a family arrangement, would occasion the vesting of the whole legal ownership in trustees, and the objects of the settlement would, therefore, take only equitable rights; whereas, if the property were freehold, it would probably be sufficient to vest in trustees an inconsiderable portion of the legal ownership.

As to COPYHOLDS—how conveyed, and of what limitations susceptible.

COPYHOLDS do not fall within the scope of these sheets; but we may shortly observe that by *custom*, controlling the *will* of the lord, the copyhold tenant,—originally a mere slave bound to toil and to obey,—has acquired an interest sure and reputable, though not, indeed, in all respects so highly privileged as the freehold; that copyholds are unaffected by the statute of uses; that a copyhold tenement can be transferred at law only through the medium of a surrender into the hands of the lord of the manor, to the intent that the lord may admit into the tenancy the person in whose favour the surrender is expressed to be made, both the surrender and admittance being entered upon the court-rolls; that *uses* declared upon a surrender of copyholds are merely *directions* to the lord whom he shall admit; that such directions to the lord, though once received or rejected at pleasure as the humble petitions of the serf, are now recognized and enforced by the judicature as mandates of the lawful proprietor; that (notwithstanding some grave doubts (*a*) whether uses of copyholds must not conform to the rules of the common law) it is clear, upon principle and authority (*b*), that such directions may assume all the forms of future and shifting destinations, (including powers of appointment (*c*)), into which the freehold use is convertible; that the legal tenant may, as in the instance of freehold and leasehold property, be a trustee for the benefit of other persons, whose equitable rights, however, being incapable of tenure, are

(*a*) Watk. Cop. 99, 197, 208.

(*b*) Sand. on Surr. of Cop.; Boddington v. Abernethy, 5 Barn. & C. 776.

(*c*) The King v. The Lord of the Manor of Oundle, 1 Adolph. & Ellis, 283; 3 Nev. & Mann. 484.

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not cognizable by the lord, nor therefore necessarily apparent on the rolls of the manor.

Extensive right of modification and alienation enjoyed over real property.

As to all other kinds of property, the fullest right of alienation exists, although the convenient exercise of that right is obstructed, in some instances, by the technicalities of the common law. Keeping within the salutary rule, commonly called the *rule against perpetuities* (*a*), which prohibits destinations calculated to withdraw the corpus of property from commerce beyond the period of a life or lives in being (the law esteeming a child *en ventre sa mere* a life in being) and twenty-one years afterwards, and also within a modern statute (*b*) imposing some equally wholesome restrictions on the accumulation of *income*, to which the rule of law was too indulgent, (*c*) almost every destination, compatible with the great principles of public policy, may be accomplished. Whatever objects are attainable by *will*, may, with the help of uses and trusts, be likewise attained by an instrument operating *inter vivos*, and the intention equally governs the construction of both species of assurance. It is, however, a position so common as to be almost proverbial, that wills are expounded less strictly than deeds; but with two exceptions in favour of wills, (one of which exceptions permits a legal estate of inheritance to pass without the word *heirs*, and the other permits estates to arise by implication—i. e. *necessary* implication,) deeds and wills appear to be really subject to the same general canons of interpretation, though the language of the courts in adjudi-

(*a*) The principle of this important rule, the slow growth of cautious adjudication, was not finally settled till the late great case of Cadell v. Palmer, 10 Bing. 140.

(*b*) 39 & 40 Geo. 3, c. 98.

(*c*) Thelluson v. Woodford, 4 Ves. 227, 11 Ves. 112.

eating upon wills, has unfortunately laid them open to a kind of indefinite liberality. The law, in regard as well to the terms as to the substance of the destination, even when effected by deed, is sufficiently indulgent. In framing deeds, no legal necessity dictates the observance of those forms which practice (and practice alone) has established, for the technical symmetry of a deed may be discarded at pleasure; but an adherence to forms approved and understood, conduces to perspicuity and certainty, and, strangely as this may sound, even to brevity. The skilful conveyancer, abundantly stored with such forms, and familiar with the flexible qualities of uses and trusts, executes the plans of prudence, promotes the speculations of commerce, and not unfrequenty humours the schemes of vanity. Nor is it less worthy of remark that among all the various interests which his art can raise in real property, but one solitary instance occurs of an interest absolutely inalienable. If the income of an estate, or any benefit to be derived out of it, is settled upon a *married* woman for her sole use, free from marital control, *with an express prohibition against alienation* (*a*), she cannot, while the coverture continues, dispose of her interest (*b*). With this exception, the impediments to

(*a*) Sturgis v. Corp, 13 Ves. 190; Brown v. Like, 14 Ves. 302; Witts v. Dawkins, 12 Ves. 501: Glyn v. Baster, 1 Younge & Jerv. 329.

(*b*) The recent decisions have involved the doctrine concerning separate estate in much perplexity. The following attempt to exhibit the result of those decisions is submitted with diffidence:—I. A gift to the separate use of a woman who is *not* married when the gift has its inception, operates as a simple gift to her; and, therefore, if she marries, the property will not be at her sole disposal during her coverture, nor protected from the control of her husband or from the claims of his creditors. II. A gift to the separate use of a woman who *is* married when the gift has its inception, determines, as to the

Equitable doctrine of separate estate, and unalienable trusts, considered with reference to recent decisions.

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alienation are entirely *legal*, resulting from the rules of tenure; for every other kind of *equitable* interest

right of separate enjoyment, with her *then* coverture, operating, from the period of its determination, as a simple gift to her, and, therefore, if she marries again, the property will not be at her disposal during the future coverture, nor protected from the controul of the future husband or from the claims of his creditors. In each of the cases above proposed, the after-contracted marriage will be attended with the same rights and incidents as if no separate enjoyment had been indicated. These are conclusions from the case of Massey v. Parker, 2 Mylne & Keen, 174, decided by the present Master of the Rolls, which seems, however, to be somewhat obscured by the blending of two apparently distinct subjects, namely, the privilege or capacity of a married woman to have separate property, attended with the *jus disponendi* incident to property, and her incapacity, arising from an express prohibition, to dispose by way of anticipation. In the cited case, there was no attempt to create an unalienable trust; no clause in restraint of anticipation; but the question was, whether a gift to the separate use, without more, of an unmarried woman (assuming that there were words sufficient to create such a gift, which was also made a question,) was effectual on her afterwards contracting marriage to secure to her the separate enjoyment of the property given; or, in other words, whether the gift then began to confer the privilege or capacity of sole ownership in regard to that property; whereas the decision apparently proceeds upon grounds such as these,—that "the legatee, being unmarried at the time of the testatrix's death, the intended restriction was inconsistent with the nature of the interest given, and therefore inoperative; that an attempt so to fetter the interest of a male legatee cannot succeed, (Brandon v. Robinson, 18 Ves. 429,) and that the same rule applies to an unmarried female legatee, (Woodmeston v. Walker, 2 Russ. & Mylne, 197; Brown v. Pocock, 2 Russ. & Mylne, 218; 2 Mylne & Keen, 189); that such fetters, though binding upon a married female legatee during her coverture, cease upon her becoming discovert, (Barton v. Briscoe, Jacob, 603); that the only question, therefore, was, whether where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture; that they were inoperative before marriage, because they were inconsistent with the nature of her estate; that the estate and interest were absolute before marriage, and the trustee held the legacy for her absolutely; that she

Observations on Massey v. Parker.

in land, from an equitable right to the fee-simple down to an equitable right to the sum of ten pounds out of

might have taken it herself, or have given it to any one, and why might she not by the act of marriage give it to her husband? and that the very point was decided in Newton v. Reid, 4 Sim. 141." Now, it is remarkable, that the privilege which equity has conferred npon a *married* woman, of exercising preprietary rights free from marital controul, is here treated as a *restriction* or an imposition of fetters; and that (the subject-matter being a gift to the separate use of an unmarried woman) the point discussed throughout appears to be, not whether upon the legatee's contracting marriage the *privilege supervened*, but whether, upon her contracting marriage the *restriction ceased* or the fetters were broken. That the words indicative of separate enjoyment were " inoperative before marriage," is clear, not because " they were *inconsistent* with the nature of her *estate*," but because, the woman being single, their operation was simply *impossible* in her *state*. The question of inconsistency can arise only when property is given, while the *jus disponendi* incident to property is attempted to be restricted or fettered:—such was the complexion of all the cases cited in the judgment, which, therefore, seem not to have touched the point of the principal case, unless in deciding that a restriction cannot be prospectively imposed, they are to be considered as having decided that a privilege cannot be prospectively conferred. The legatee's ability to give the fund to the husband was not the matter in controversy, but rather the effect of the act of marriage in giving it to the husband by intendment of law, notwithstanding the declared intention of the bill that on marriage it should be at her sole disposal as the creature of equity. This case, however, may be considered as having established the two propositions already stated, though the reasoning should be thought not entirely conclusive, or the authorities not precisely applicable. III. A prohibition against alienation or anticipation is effectual only when applied to the separate property of a woman, and since a woman cannot, as we have seen, enjoy separate property as against a husband to whom she was not married at the time when the gift had its inception, it follows that the prohibition is, with reference to her coverture by such after-taken husband, ineffectual. The adequacy of the gift to create separate property, and the adequacy of the prohibition to restrain its disposition, are, therefore, co-relative and co-extensive. But—IV. A gift to the separate use of a woman, made in contemplation of her marriage with a particular individual, is presumed to be effectual to constitute her sole

the land, may be disposed of by a mere memoran-

owner during the intended coverture, at least if the intended husband assent to the gift; and a restriction on alienation annexed to such gift is of course effectual to the same extent. And—V. A gift, whether the object be male or female, married or unmarried, may be made determinable by a clause of cesser, or defeasible by a gift over, in the event of alienation, total or partial, voluntary or involuntary; for by such a clause or gift the property itself is withdrawn, and not merely a right incident to property is denied. The third and fifth propositions are deduced, for the most part, from the cases cited in the above judgment. (See also, on this branch of learning, Adamson v. Armitage, Cooper, 283; Prichard v. Ames, 1 Turn. & R. 222; Stanton v. Hall, 2 Russ. & M. 175; Tyler v. Lake, 4 Sim. 144; 2 Russ. & M. 183; Jones v. Salter, 2 Russ. & M. 208; —— v. Lyne, 1 Younge, 562; Kensington v. Dolland, 2 Mylne & K. 184; Graves v. Dolphin, 1 Sim. 66.) The design of this note is to show what the law now is, rather than what it recently was, or what it ought to be.

History of the doctrine.

The steps by which the doctrine first slowly advanced, and then suddenly retrograded, appear to be these:—Equity, at an early period, permitted a woman in the state of coverture to have the sole dominion over property, as well the corpus as the income, and either with or without the machinery of a trusteeship, thus departing from the principle of the common law: at a comparatively modern date, equity, on the ground of its competency to regulate its own creature, sanctioned the desire,—indeed devised the means,—of rendering separate property unalienable during coverture, which was effected by a simple prohibition against anticipation: then, it was held (though a contrary opinion had prevailed,* and is still entertained by a high authority,) that an unalienable provision could not thus be made for a male, because the *jus disponendi* is inherent in property, subject only to the equitable exception in favour of coverture:—this principle equally reached, and was of course applied to, the case of an unmarried female, who therefore, notwithstanding the prohibition, might dispose at pleasure: and as it was determined, more recently, that her disposition, while actually discovert, was not liable to be defeated or abridged by future coverture, she might dispose absolutely: still it was the general impression among lawyers (and the universal practice of conveyancers accorded) that separate estate might be created, and anticipation restrained by a gift and prohibition made and imposed as

* Sugd. Pow. 1st ed. 105.

dum (a), drawn up in utter ignorance or contempt of technical form and phraseology. CHAP. IV.

Conclusion.

We have thus attempted to deduce the history of the law of real property down to the present time, and to make a practical application of the principles developed in its progress.

In tracing the ownership of land from its originally simple uncompounded state, our attention has been fixed on the two great epochs formed by the early separation of the use from the possession, and by the abortive attempt of the legislature again and for ever to consolidate them—an attempt which terminated in the communication to the legal estate of some of the popular qualities of the use, and the reproduction of the ancient use under the guise of a modern trust. From this sketch it will appear how small a portion of our real property code is the result of design. Institutions, stern and oppressive in their origin, have been gradually humanized by the progress of opinion, accident favouring, and the judicature abetting, the diffusion of a more

well during the existence of coverture as during its non-existence, or, indeed, during the non-existence of the object, but subject of course to be swept away by alienation during discoverture: But from this point the doctrine began to recede, for it was now held (Newton v. Reid, *supra*,) that the *prohibition* was void *ab initio*, unless the state of coverture was co-existent with the commencement of the gift, so that the woman must be married at the death of the testator or the execution of the settlement: and, lastly, it was held (Massey v. Parker, *supra*,) that the *gift* itself, so far as it assumes to create separate property, is also void *ab initio*, if the same ingredient of contemporaneous coverture be wanting.

(a) "In case an equitable interest is sold, it is clear that the mere payment of the purchase-money would operate as a transfer of it."—Sanders on Uses, 224.

 grateful policy. While fraud and fear, the cupidity of monks, and the turbulence of barons, seeking shelter from the penalties of mortmain or of treason, laid the foundation—the growing spirit of freedom, availing itself of legislative imbecility and technical astuteness, reared the superstructure—of that mixed system of legal and equitable interests, which, however elaborate in its machinery, and subtle in its abstruser doctrines, has proved adequate, as well to satisfy the wants, as to indulge the wishes, of a highly cultivated people.

Yet the philosophic observer, who takes a theoretical view of our system of conveyancing, is struck by some peculiar features, which he cannot readily reconcile with its acknowledged practical efficiency. He remarks that the transfer of the freehold requires a complex assurance; that many desirable modifications of property cannot be effected at law by a simple and direct disposition, but must be reached through the circuitous medium of uses, deriving legal efficacy from the statute; that legal ownerships created by means of uses are exposed, along with estates created at the common law, to accidents occasioned by the rules of tenure—rules which, though no longer formidable to the freedom of the proprietor, yet sometimes exert (as in the instance of the destruction of contingent remainders) a mischievous energy; and that, in order to elude their force, resort is had to passive trusts, founded upon an artificial distinction between the legal property in the subject and the equitable right to the enjoyment. But, although our real property code may still exhibit some vestiges of the iron age, yet this outline of its history will suffice to show how various causes have happily concurred to produce a total change in the severe aspect of the feudal

polity. At this day the remnants of ancient strictness appear but as specks upon the general excellence of the system, and even these are gradually yielding to judicial (*a*) and legislative (*b*) correction.

(*a*) The difficulties which existed in regard to the transfer *at law* of contingent and executory interests, have been lessened by the cases of Doe v. Martyn, 2 Man. & R. 485; 8 Barn. & C. 497; Christmas v. Oliver, 10 Barn. & C. 181. Bensley v. Burdon, 2 Sim. & Stu. 519; [*sed vide* 2 Sugd. Vend. 9th ed. 264, n. *b.*; see Ex parte Mary Gill, 1 Bingh. new series, p. 168, and note; her estate was not contingent, but vested, 7 Cruise's Dig. 2d ed. by White, back of Table of Contents.] The *tortious* operation of feoffments, and the doctrine of *disseisin*, have received some modification from the cases of Doe v. Lynes, 3 Barn. & C. 388; and Doe v. Hall, 2 Dowl. & R. 38.

(*a*) *Vide infrà*, chap. V.

CHAPTER V.

OF THE STATUTES OF 3 & 4 WILLIAM IV.

RELATING TO REAL PROPERTY.

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THE Acts of Parliament lately passed for amending the Law of Real Property, though occasionally adverted to in the preceding chapters, have been reserved for separate consideration. For, as these enactments have regard to the pre-existing law, and suppose an intimate knowledge of its principles and practice, and as all future enactments must partake, more or less, of the same retrospective character, it was thought desirable that the preceding chapters, with the forms and annotations by which they are accompanied, (*a*) should exhibit a distinct and independent view of the fundamental rules of real property and the modes of conveyancing, as they stood anterior to the recent interposition of the legislature. Besides, the full benefit of the new statutes is reserved for after-times, nor, if it were to be instantly felt, could those statutes be said to have wrought any considerable change in the essential features of the system, so far at least as the writer has attempted to delineate them; and were it not for the practical importance of those statutes, and the deficiency of information respecting them, they might be dismissed, with a brief notice, confined to an indication of such alterations as affect the general outline presented to the student in the previous pages.

(*a*) *Vide infrà*, Precedents, Part II. and notes.

FINES and RECOVERIES. 3 & 4 Will. 4, c. 74, (*Royal Assent*, 28*th Aug.* 1833.)

Of these acts, the most important, as it regards the practice of conveyancing, and at the same time the most distinguished as well by experimental boldness, as by systematic design and elaborate execution, is the ACT FOR ABOLISHING FINES AND RECOVERIES, AND SUBSTITUTING MORE SIMPLE MODES OF ASSURANCE. But even this act consults the old law, and it is not possible to appreciate or expound its provisions without an acquaintance with the assurances which it has superseded,—with their various uses and modes of operation, their learning, and their language. The principal provisions of the act may be considered under the following heads:—

1. Abolition of fines and recoveries; also of warranty, as a bar to issue and remainder-men.

I. The abolition of fines and recoveries;(*a*) with the exception of cases in which a writ of dedimus or other writ, in the regular course of a fine or recovery, was sued out on or before the 31st December, 1833; and subject also to a provision (*b*) by which engagements contracted before the act came into operation, to levy fines or suffer recoveries, are referred to an assurance by deed inrolled pursuant to the general provision of the act in regard to tenants in tail, if that assurance would be equivalent to the fine or recovery, or, if not, to a special deed expressly purporting to produce the full effect of the fine or recovery, and which effect the act attributes to such deed. The operation of future warranties as a bar to issue in tail and remainder-men (*c*) is also taken away. (*d*) If the act had stopped here, the statute of Westminster 2, *de donis conditionalibus*, (*e*) would have recovered its original force, and entailed estates would consequently have ceased to be alienable. In re-

(*a*) S. 2.
(*b*) S. 3.
(*c*) Butl. Co. Litt. 373 b, n. 2.
(*d*) S. 14.
(*e*) 13 Edw. 1, c. 1.

gard, therefore, to the subsequent clauses, substituting other modes of alienation by tenants in tail, the act must be considered as an enabling act. The power of breaking through the fetters of a strict settlement, as that power existed under the old law, had been gained by legal cunning and established by judicial connivance,(*a*) in contravention of the statute *de donis;* but the right of aliening entailed estates is now openly conferred (*b*) and exactly defined by the legislature itself. The act, indeed, provides *de novo* a code comprising the whole law of alienation by tenants in tail, as well as by married women, assimilated in its general principles to the old law, but at once more simple and more comprehensive.

Fines and recoveries, void or defective, supplied or cured in certain cases.

II. The confirmation of titles impeachable by reason of the insufficiency of fines and recoveries, arising either from defect of jurisdiction in the court,(*c*) from informality in the proceedings,(*d*) or from the want of a *legal* tenant to the præcipe; (*e*) and the relieving, in particular, of titles to land of the tenure of ancient demesne from the confusion in which they are for the most part involved by the effect of fines and recoveries inadvertently levied or suffered in the Court of Common Pleas at Westminster. Though the remedial clauses relating to ancient demesne must be highly acceptable to the owners of lands of that tenure, yet as their operation is limited to a few inconsiderable districts, it is enough, in this place, to have referred to them. As the other provisions under this head are more generally interesting, we shall notice them in detail.

(*a*) Taltarum's case, 12 Edw. 4.
(*b*) S. 15.
(*c*) S. 5.
(*d*) S. 7 and 8.
(*e*) S. 10 and 11.

Defect of jurisdiction.

1. By the concluding branch of the fifth section, fines and recoveries levied or suffered in courts whose jurisdiction does not extend to the lands in question, or even in courts unlawfully constituted or held without due authority, are established. This is undoubtedly a strong enactment. Suppose A. tenant in tail of lands lying on the verge, but without the pale, of the jurisdiction of a local court, to have suffered a recovery in that court, and died, leaving an eldest son, B., but having devised the lands to his younger son, C.;—inasmuch as the recovery is absolutely void, B. enters and enjoys, and exercises various acts of ownership, selling, mortgaging, or settling. After the lapse of many years, an act of parliament declares the recovery valid, defeats the title of B. and his alienees, and sets up the title of C. In order to obviate this and other possibly injurious effects of the clauses under consideration, a provision (*a*) was added by which support is refused to fines and recoveries, where any person, whom the fine or recovery, if valid, would have barred, shall, before the act, have had *dealings* with the lands on the faith of the *invalidity* of the fine or recovery, or where any person shall, at the passing of the act, have been in possession in respect of an estate which the fine or recovery, if valid, would have barred. It is not clear, perhaps, that this qualification is sufficiently large and precise to render the concluding clause of the fifth section practically just and safe. An able writer has remarked that this provision "precludes the possibility of ascertaining that no fine or common recovery has been levied or suffered of any given property without searching, not only the Court of Common Pleas at Westminster, but the records of every court having peculiar jurisdiction throughout England and Wales." (*b*) Even this

(*a*) S. 12.

(*b*) 9 Jarm. Conv. 403.

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remark is not, perhaps, sufficiently pointed, inasmuch as it would appear, that if any body of "persons had *assumed* to hold courts in which fines or common recoveries had been levied or suffered, (i. e. the forms of fines and recoveries had been gone through,) and such courts should be unlawful or held without due authority," (which, indeed, seems to be implied by the word *assumed*,) then fines or recoveries "levied or suffered in such unlawful or unauthorised courts" would be rendered valid by the act. In short, it is enough to know that there was the semblance of a court pretending title to entertain proceedings in the nature of fines and recoveries, without inquiring into the extent of its jurisdiction, or the legality of its constitution.

—errors in form.

2. Titles are much indebted to the seventh and eighth sections, which cure defects occasioned by errors in names and by misdescriptions and omissions of parcels, without further amendment, (*unless* any court of competent jurisdiction shall have refused to amend,) (*a*) but more especially to the tenth and eleventh sections, which cure defects occasioned by non-inrolment *within due time* of a bargain and sale to make a tenant to the præcipe, or the non-concurrence of the owner of the *legal* freehold in making the tenant, provided the beneficial owner of the freehold in possession shall within the time limited for making the tenant have conveyed to the tenant. The non-inrolment clause applies to the single case of a bargain and sale within the statute of Henry 8; purporting to make the tenant; it does not cure non-compliance with any other statute requiring inrolment or registration, nor extend to any case in which the deed to make the tenant is insufficient by reason of the non-inrolment of a *previous* bargain and sale. Sup-

—want of a good tenant to the *præcipe*.

(*a*) S. 12.

pose that A., tenant for life, remainder to B. in tail, became bankrupt; B. purchased and obtained a conveyance of A.'s life estate from the assignees, and then conveyed to a tenant to the præcipe, and suffered a recovery, but the bargain and sale (*a*) of the commissioners (which operated only from the time of inrolment) was not inrolled till after the conveyance from the assignees;—the recovery would be bad, and not helped by this enactment, as well because the bargain and sale was not within the Statute of Inrolments, (*b*) as because it did not purport to make the tenant. Nor does this provision appear to do more than enlarge indefinitely the time for inrolment. The provision relative to the non-concurrence of the legal owner will be readily and justly appreciated by all who have had any experience in titles derived under recoveries. One example will suffice:—Lands are limited to the use of A. for the life of B., upon trust for B., with remainder to C. in tail, with remainders over; B. alone conveys to a tenant to the præcipe, and suffers a recovery, which of course is void for want of the legal freehold; but as B. was beneficially entitled to an estate of freehold in possession and did convey to the tenant, the recovery is made valid by the act. It may possibly be doubted whether the act has contemplated the case, where A., the legal freeholder, is a conveying party to the deed for making the tenant, but owing to some informality, (as the want of a lease for a year, or livery on a feoffment, &c.) he does not *effectually* convey; it is conceived, however, that this case would fall within the words "in consequence of any person in whom an estate at law was outstanding having *omitted* to make the tenant." But it is clear that a recovery void for want of an effectual legal conveyance by a

(*a*) *Sed vide* 1 & 2 Will. 4, c. 56, s. 26.

(*b*) *Vide infrà*, Prec. 16, n.

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person seised at law for his own benefit is not aided by the statute. Thus if lands are limited to the use of A. for life, with remainder to B. in tail, with remainders over; and A. conveys by release, without a lease for a year, or a feoffment without livery, to make a tenant to the præcipe, and suffers a recovery, which of course is void, the act would not make the recovery good, and it would avail nothing that the conveyance of A. was sufficient to pass his interest in equity. The instances are very numerous in which, from ignorance or carelessness, the concurrence of persons seised as trustees, mortgagees, &c. of the immediate legal freehold in making a tenant was omitted to be procured; and cases have occurred in which it was a point of great nicety whether the legal freehold was outstanding in trustees or not, and in which recoveries were suffered either in the confidence that the legal freehold was not outstanding, or on the speculation that such might be the result of a judicial decision. Thus, in a late case, estates of very great value were devised to trustees in terms which rendered it questionable whether they took the legal fee, or only the legal freehold for the life of A., who was made beneficial tenant for life, with remainder to B. in tail, with remainders over, and who alone (the trustees being adverse) conveyed to a tenant to the præcipe, upon which a recovery was suffered by B.; —if the trustees took the legal fee, then the entail and remainders were equitable, and well barred by the recovery, but if they took the legal freehold only, the recovery was bad, and the person in possession would probably have been evicted from these large possessions, but for the intervention of the legislature, which, by the provision in question, remedied the defect, or rather supplied a title.

III. The substitution, for the barring of an estate tail, and all estates and interests to take effect after the determination or in defeazance of the estate tail, of an assurance by deed, (*a*) (i. e. a writing under seal,) to be inrolled (*b*) in the Court of Chancery within six calendar months after the execution.

III. Mode of assurance substituted for barring entails of land.

The inrolment requisite for the purpose of giving effect to a disentailing assurance under the act does not excuse a non-compliance with the requisition of any other law in regard to inrolment or registration; so that, if, for instance, the lands lie within a registry district, the deed must also be registered, and if the transaction be within the annuity acts, a memorial must be inrolled. But the inrolment may be operative for several purposes, where inrolment in the same court and within the same period will satisfy the law in each case. (*c*) Where the deed is intended to have the double operation of barring an entail and passing the estate of a married woman, it must be perfected with the distinct ceremonies appropriated to those several objects.

Inrolment under this provision does not supersede inrolment, prescribed by any other law.

The assurance must be, or must purport to be, an actual conveyance *inter vivos*, adapted to pass the legal inheritance, (*d*) as a feoffment, (*e*) a lease and release, a

Necessity of a legal conveyance by deed.

(*a*) S. 40. (*b*) S. 41.

(*c*) 27 Hen. 8, c. 13; 9 Geo. 2, c. 36.

(*d*) "And be it further enacted, that every disposition of lands "under this act by a tenant in tail thereof, shall be effected by some "one of the assurances (not being a will,) by which such tenant in "tail could have made the disposition if *his* estate were an estate *at* "*law* in fee simple absolute; provided, nevertheless, that no disposi- "tion to be made by a tenant in tail shall be of any force, either at "law or in equity, under this act, unless made or evidenced by *deed;* "and that no disposition by a tenant in tail resting only in *contract*, "either express or implied, or otherwise, and whether supported by

(*e*) *Vide infrà*, Prec. No. 1, 2.

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bargain and sale,(*a*) or, if the estate tail be not in possession, a grant.(*b*) It is not enough, on the one hand, that the instrument is a deed, unless it be adequate to pass the estate of the tenant in tail, considered as a legal fee simple, nor, on the other hand, that it is an assurance adequate to pass such estate, unless it be also a deed.

The necessity of such a conveyance extends to mere equities and rights.

Whether the estate tail be legal or equitable, vested or contingent; or, having been once legally vested, it has been divested and turned to a right;(*c*) nay, even if the operation of a previous fine with proclamations, or a previous assurance under the act itself, has absolutely barred the issue in tail, and reduced the entail to the shadowy privilege of barring claimants in remainder or reversion;—still the tenant in tail, or the would-be tenant in tail, must be treated, for the purposes of this act, as having a legal estate in fee simple in the land, and must convey by one of those ordinary modes of assurance which the law has appropriated to the transfer of freehold interests. The act, in requiring a legal conveyance, as well of *estates* in the land, as of unsubstantial rights and equities in respect of the land, may be thought to have strained the application of technical forms beyond technical reasoning; but it was the policy of the legislature, while it abolished the old solemnities,

" a valuable or meritorious consideration or not, shall be of any force " at law or in equity under this act, notwithstanding such disposition " shall be made or evidenced by deed."—S. 40. For this clause the writer is responsible; two or three other suggestions, particularly one in regard to the express exclusion of the jurisdiction of equity, were adopted. The eminent lawyer whose name is prefixed to this work took considerable interest in the bill; but, allowing for such casual assistance, on minor points, the merit of the plan and execution of the statute belongs wholly and exclusively to Mr. Brodie.

(*a*) *Vide* S. 41.

(*b*) *Vide infrà*, Prec. No. 10.

(*c*) S. 1. Definitions.

and substituted more simple modes of assurance, still to exact the observance of ceremony, and to prevent settlements, framed for the most part with caution and deliberation for the purpose of preserving estates in families, from being annulled by instruments unadvisedly prepared, or inadvertently executed.

Mode of assurance, how to be ascertained.

But it should be observed, that the words of the act are, "as if *his* estate were an estate at law in fee simple absolute," which must be interpreted "as if an estate in fee simple absolute occupied the very place of the estate tail;" so that if, for example, an estate tail be expectant on a particular estate, an assurance adapted to pass a remainder in fee will satisfy the enactment. The test, therefore, to be applied in order to ascertain the appropriate mode of assurance is—first, to consider the person intending to convey as owner of a legal estate in fee simple; and secondly, to consider the position which that estate would occupy, having regard, too, to the nature of the subject.

—shewn by examples, of both legal and equitable entails.

In order to assist in the practical application of the new enactments, it may be useful to intersperse from time to time a few examples. In illustration, therefore, of the preceding position, let us suppose the lands limited to A. in tail, with remainders over; here it is obvious that A. must convey by feoffment, lease and release, or bargain and sale, because if A. were seised in fee simple in possession, he must adopt one or other of these modes of assurance; but if the subject of the intail were an advowson, or other incorporeal hereditament lying in grant, then a deed of grant would be the appropriate kind of assurance. Again, if lands are limited to the use of A. in fee, upon trust for B. in tail, with limitations over, B., though having merely an equitable right to an estate

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tail, must pursue the very same form of assurance as if he were seised of a legal estate tail, just as an equitable tenant in tail, with limitations over, must, before the statute, have gone through the form of a common recovery. In this respect the act has established uniformity, and preserved the analogy, though the case of an equitable estate or interest requiring, in order to pass or bind it, the extraordinary mode of assurance prescribed by law in regard to alienation by tenants in tail or married women, forms now, as it formed before the statute, the single exception to the principle that a mere equity may be disposed of by any instrument, however informal, which expresses the intention.(*a*) It should be observed, that in the case last put, the concurrence of A., the trustee, would be wholly unnecessary, except for the purpose of completing the *legal* title in B., or his alienee, which the trustee could not be called upon to do till the equitable fee had been acquired by means of an assurance under the act. It is hardly necessary to state that whether the equitable entail be created by an actual conveyance or settlement, or by a mere executory trust or contract, the same formality must be observed. But if lands are limited to A. for life, remainder to B. in tail, with remainders over, then a deed of grant would be a sufficient assurance by B. under the act, though, as we shall presently see, no assurance by him, without the consent of A., would be effectual to defeat the remainders. If the lands are limited to the use of A. in fee, upon trust for B. for life, and after B.'s death, upon trust for C. in tail, with limitations over, the same observations will apply. In every case, the question to be asked is, not whether the estate or interest of the tenant in tail be of such a quality as to demand or admit of a legal conveyance, but what mode of

(*a*) *Vide suprà*, 85.

assurance would, if the estate or interest were a fee simple at law, be necessary to convey it?

—by examples of a mere right to an estate tail, or ability to bar the remainders.

Cases may occur in which there exists only a right to an estate tail, or in which nothing remains but the bare capacity of defeating the right of the ulterior claimants. Thus, if A., tenant in tail, with remainders over, had enfeoffed B. in fee, thereby discontinuing the estate tail, and putting the issue and remaindermen to their right of action, A., or his issue, intending to perfect the title of B., must adopt the same mode of assurance as if no previous alienation had taken place. So, even if A. had conveyed to B. by fine with proclamations, still it would be requisite that A., or his issue, should convey as if seised in possession of the legal fee. Yet in the last example, A. or his issue, had by the effect of the fine, (as, in the previous example, A. had by the effect of the feoffment,) been absolutely denuded of all estate, right, and interest, at law and in equity, retaining only the power of excluding those in remainder or reversion after the estate tail, and thus establishing the defective title conferred by the original assurance. Before the statute, titles so circumstanced were remediable only by a recovery to be suffered by A. or his issue, who could not have suffered an effectual recovery without the assistance of B., the alienee, who had the legal freehold, and must, therefore, have made the tenant to the præcipe. Now, the same result may be obtained by the lease and release of A., or his issue, who, having not a remnant of interest left, must convey like one estated in fee, while B., in whom the fee (defeasible, indeed, but still the legal fee), substantially resides, need not convey at all. This is the extreme case in which the statute exacts a solemn conveyance where it has not even the semblance of a subject on which to operate;

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but it will probably appear that facility and certainty in practice, if not consistency in principle, were best consulted by extending the requisition of a legal assurance to every possible case. It should be observed that titles may be in a similar predicament in consequence of imperfect assurances by tenants in tail subsequently to the statute. Thus, if lands are limited to A. for life, remainder to B. in tail, with remainders over, and B. conveys to C. by an assurance inrolled under the statute, without the consent of A. as protector,(a) C. would acquire a base or determinable fee, which might at a subsequent period be enlarged into a fee simple by the assurance of B. or his issue, with the consent of A., if living, or if dead, at the pleasure of B. or his issue. But in pursuing these remarks in this place, we should be anticipating in some degree considerations pertaining more properly to other divisions of our subject.

General caution as to the mode of assurance.

The best advice which can be given to the general practitioner, is to adopt in every case the common assurance by lease and release, inrolling both instruments. It can rarely happen that he would think of resorting to a feoffment; a covenant to stand seised is still further removed from ordinary use; a grant supposes the case of an estate tail in remainder, or of an incorporeal subject, and its use requires some degree of knowledge and discrimination. It may be thought, however, that a bargain and sale inrolled is the natural and proper assurance. But the circumstances of the unfitness of a bargain and sale where uses are required to be raised upon the conveyance,(b) and of its requiring a five pound stamp where it does not also operate as a mortgage or conveyance upon sale, will exclude it from general use. With respect to an assurance by

(a) *Vide infrà*, 106. (b) *Vide infrà*, Prec. No. 12, n. (43).

lease and release, or by grant, some practitioners have felt an apprehension lest, if no precaution were taken, a conveyance to uses by tenant in tail, framed as a lease and release or grant, and intended to operate as such, should take effect, by reason of the inrolment, as a bargain and sale, and, consequently, vest the legal fee in the intended re-lessee or grantee to uses; and the antidote proposed is the omission of the words "bargain and sell." But it is clear that unless the conveyance were incapable of operating in its primary character of a lease and release or grant, the courts would not give it effect in its secondary character of a bargain and sale; and it is equally clear that there is no magic in the words "bargain and sell." A more effectual expedient, where the nature of the transaction does not preclude it, (as it necessarily does in the instance of a purchase or a mortgage,) is to avoid inserting a pecuniary consideration.

Expediency of an assurance confined to the purpose of acquiring the fee.

As it is requisite to inrol the assurance at length, it will often be found expedient that the tenant in tail should acquire the dominion over the fee by a simple conveyance to a third person, to his (the tenant in tail's) own use or to uses in his favour, previously to an intended sale or settlement, or especially an intended incumbrance of a temporary description. The nature of the provision made by the act, and to which we shall hereafter advert, in regard to alienations for a limited purpose, renders it particularly inexpedient to disentail through the medium of a mortgage.

—of procuring the execution by the grantee.

The cautious practitioner will procure the person named as re-lessee or grantee to uses to execute the deed, lest he or his heirs, by disclaiming the conveyance, should raise a question as to the validity of the title founded upon it.

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Inefficacy of contracts; and exclusion of equitable relief.

It is clear that no covenant or contract, though under seal, will be of any avail as against the issue in tail, remainder-man, or reversioner. All equitable relief, in the case of a defective or informal assurance, is expressly and anxiously excluded.(*a*) The all-absorbing nature of equity, ever seeking to insinuate its jurisdiction, rendered that precaution necessary. There was danger lest, after the legislature had abolished the ancient solemnities, and conferred upon tenants in tail the power of conveying as if seised in fee simple, without any other ceremonies than sealing, delivery, and inrolment, equity should step in to enforce the mere contract of a tenant in tail, founded on valuable or meritorious consideration; just as, in the case of a settlement to such uses as A. shall, by deed inrolled in Chancery within six calendar months after the execution, appoint, and, in default of appointment, to uses in strict settlement, equity would certainly supply, in favour of a purchaser, wife, child, or creditor, the non-observance of the prescribed formalities. (*b*)

Caution as to covenants.

As an instrument in the form of a covenant will not bind the issue or remainder-man, care must be taken to adopt in all cases the form of a legal assurance, disregarding as well the state of the title as the nature of the transaction. Thus a further charge is commonly effected by way of covenant; but if A., tenant in tail, having mortgaged for a *term of years* only, wishes to further charge, then, as the existing disposition binds the issue and remainder-man to the extent only of letting in the incumbrance, a deed of covenant will not be effectual, but the tenant in tail must in terms re-demise

(*a*) S. 47. (*b*) Sugd. Pow. 5th ed. 355.

and confirm. The caution here given does not, of course, extend to a covenant to stand seised, which under the operation of the statute of uses is become a legal assurance, and may therefore be employed for the purpose of unfettering an entailed estate in the few cases to which it is applicable.

The assurance must be inrolled,

The deed, if inrolled within the prescribed time, takes effect from the execution, as if inrolment had not been required, (*a*) but *a purchaser for valuable consideration under a subsequent deed previously inrolled takes precedence.* (*b*) This clause appears to be a broad and unqualified adoption of that principle of registration which gives priority to the instrument first registered. Even the General Registry Bill did not attempt to go that length, but provided a *caveat* and other guards against surprise and fraud. The act does not require an *indenture;* but if the assurance adopted be a bargain and sale, it must be by deed indented, (*c*) though by the express provision of the act, inrolment within six *calendar* (*d*) months is sufficient.

—and, if a bargain and sale, indented.

Contingent interests may still be bound by indenture.

The mention of an indenture suggests the observation that fines were sometimes resorted to for the purpose of binding, and even passing, contingent interests by way of estoppel; (*e*) but as an *indenture* (which, if intended to operate by estoppel, should not, (*f*) by recital or otherwise, disclose the actual state of the title, and which, in

(*a*) S. 74.

(*b*) *Ib.*

(*c*) 27 Hen. 8, c. 16.

(*d*) *Vide suprà*, 59; *infrà*, Prec. No. 12, n. (43).

(*e*) Doe *v.* Martyn, 8 Barn. & C. 497; 2 Mann. & R. 485; Doe *v.* Oliver, 10 Barn. & C. 181.

(*f*) Right *v.* Bucknell, 2 Barn. & Adolph. 278; Hermitage *v.* Tomkins, 2 Lord Raym. 729; Co. Litt. 352, b.

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the case of a married woman, must be attended with the solemnities prescribed by this act, (*a*)) is equally conclusive, (*b*) it was not necessary to make any special provision with reference to such interests.

Tenants in tail *ex provisione viri.*

The stat. 11 Hen. 7, c. 20, relative to tenants in tail *ex provisione viri*, is repealed, except as to lands comprised in any settlement made before the passing of the act; (*c*) so that if, before the passing of the act, lands were limited by A. to the use of himself A. for life, remainder to B. his intended wife for life, remainder to the heirs of the body of B. by A. (a common form of settlement in the country); B., who would be tenant in tail *ex provisione viri*, could not, in the event of her surviving her husband, and there being an heir in tail, bar the intail without the consent of such heir.

IV. Institution of a "*protector* of the settlement."

IV. The interposition of a new conservative power in the shape of a "protector of the settlement." (*d*) Under the old law, a tenant in tail in remainder expectant on an estate of freehold, could not suffer a recovery with effect without the concurrence of the freeholder, for it was necessary that the person against whom the process issued should be invested with the immediate freehold, or, in other words, that there should be what was technically called a *tenant to the præcipe*. Sometimes the freeholder was beneficially entitled; sometimes he was a mere trustee:—in either case he might refuse to join. Accident often conferred upon a stranger, in point of interest and duty, the important power of constituting a tenant to the præcipe, while it deprived the beneficial

(*a*) *Vide infrà*, 127.
(*b*) *Vide* Bensley *v.* Burdon, and Exparte Mary Gill, *suprà*, 89, n.
(*c*) S. 17.
(*d*) S. 22.

possessor, to whom that power would seem more properly to have belonged, of all control and voice on the occasion. Besides, much investigation and attention were requisite in order to ensure a good tenant to the præcipe, and numerous recoveries failed for want of a sufficient tenant. If the legislature had omitted to substitute any ceremony for the check afforded by the necessity of constituting a tenant to the præcipe, the adult son, tenant in tail, would have been enabled at pleasure to defeat the family settlement against the wish of the parent, tenant for life; on the other hand, if the legislature had provided a strictly analogous check, it would have given its deliberate sanction to an imperfect and arbitrary species of protection, indirectly resulting from the forms of the old law, and appearing altogether absurd and unintelligible when detached from the judicial proceeding of which those forms were the legitimate basis. Instead of confiding the rights of the remainderman to the technical subtleties of a fictitious process, the framer of the act has originated, on principles of reason and policy, a new functionary, under a denomination before unknown to the legal, though not to the constitutional history of the country. The protectorship is committed (*a*) (subject to certain exceptions and provisions applicable to particular cases) to the owner (or to the person who, but for an absolute alienation, whether voluntary or involuntary, would have been the owner,) of the prior beneficial estate, or of the first of several prior beneficial estates, created by the *same* settlement which creates the intail, being an estate for years determinable on a life or lives, or any greater estate other

(*a*) S. 22.

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than an estate for years,—admitting, therefore, an estate for years determinable (i. e. by death), however short, but excluding an estate for a term of years absolute, however long. Where there is a plurality of owners of the estate conferring the office of protector, each owner is constituted sole protector in respect of his disposable share. (*a*)

Assurance of tenant in tail in remainder bars the issue.

Under this act, the assurance of a tenant in tail in remainder, with limitations over, will produce, without the concurrence of any previous taker, an effect analogous to that of a *fine* with proclamations (exclusive of the operation of a fine, when levied by tenant in tail in possession, as a discontinuance, (*b*) and, when so levied with proclamations, as a bar by nonclaim, (*c*)) or, in other words, such an assurance will confer a lawful title to a fee, commensurate in point of duration with the continuance of issue in tail, (*d*) and having the alienable, devisable, and descendible qualities of a pure fee-simple;

—but not remainders over without the consent of the protector.

but in order to render his assurance of equal efficacy with a *recovery*, or, in other words, in order to bar as well his estate tail, as the estates and interests limited after or in defeazance of his estate tail, he must obtain

Consent of protector, how to be given.

the consent of the protector. (*e*) Such consent may be given either by the same deed, or by a distinct, but antecedent or contemporaneous deed, (*f*) to be inrolled in the Court of Chancery on or prior to the inrolment of the principal assurance; (*g*) and the consent once given is irrevocable. (*h*)

Tenant in tail may bar re-

A recovery could not have been suffered in vacation;

(*a*) S. 23.
(*b*) *Vide infrà.*
(*c*) *Ibid.*
(*d*) S. 34.
(*e*) S. 34.
(*f*) S. 42.
(*g*) S. 46.
(*h*) S. 44.

but the chance afforded by that circumstance to the remainder-man is disregarded by the act, which tacitly permits the assurance requisite for barring estates and interests limited to take effect after or in defeasance of the estate tail, to be made and perfected at any period of the year.

Remainders in vacation.

In the majority of cases, the privilege of consenting will belong to the person who would have been competent to make a tenant to the præcipe; but competency to make such a tenant affords no criterion (except in certain special cases to be presently considered) for ascertaining the protector of the settlement, who, instead of being a mere technical creature, is, under the reformed code, a reasonable, though not an accountable (*a*) agent. By the old law, a tenant in tail in remainder expectant upon an estate *less* than freehold was competent in himself to make a valid tenant to the præcipe, and consequently the owner of such an inferior estate was not invested with any controlling power. In that respect the protectorship established by the legislature does not conform to the old law. Thus, if lands were settled upon A. (beneficially) for a term of ninety-nine years, if he should so long live, with remainder to B. for the life of A., upon trust to preserve contingent remainders, with remainder to the first and other sons of A. successively in tail, the concurrence of B., living A., would have been requisite to enable the first son of A. to suffer a valid recovery, while the concurrence of A. would have been wholly unnecessary for that purpose; but, under the same circumstances, the new law requires the consent of A., dispensing with the concurrence of B. And it is material to observe, that if no estate of *freehold* should be standing before the estate tail of the first

Protectorship contrasted with the old tenancy to the præcipe.

(*a*) Ss. 36 and 37.

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son of A., still the consent of A. will be requisite, although under the old law the first son alone would then have been able by his unassisted act to defeat the settlement. So, the taker of a prior estate, being protector, is continued in office notwithstanding the total and absolute alienation of his estate, (*a*) either by his own act or by operation of law, so that if the limitation be to A. for life, remainder to B. for life, remainder over in tail, A. will be protector for life, although he should voluntarily alien his life estate absolutely, or become bankrupt or insolvent, or commit a forfeiture; and the act excludes from the protectorship (*b*) as well alienees as representatives real and personal, along with bare trustees, dowresses, and lessees under leases at a rent. But an estate by the *curtesy* in respect of an estate tail, or of any prior estate created by the settlement, as well as a resulting use or trust to or for the settlor, is to be deemed a prior estate under the settlement, within the contemplation of the clause appointing a protector. With respect to the case of a resulting use, it was certainly proper to provide for it, (*c*) though the writer has elsewhere endeavoured to show the difficulty of maintaining, consistently with principle, that the use can ever result for a *particular* estate. (*d*)

Exclusion of alienees, &c. from the protectorship.

In cases where more than one estate precedes the estate tail, and the person who would be protector but for the provisions (*e*) excluding lessees at a rent, dowresses, bare trustees, heirs, executors, administrators and assigns, shall stand thereby excluded, the protectorship devolves upon the person, who, if the estate ordinarily

Provision for the case of more than one prior estate, and of the exclusion of the first taker.

(*a*) S. 22. (*b*) Ss. 22, 26, 27, 28.
(*c*) Pybus *v.* Mitford, 1 Ventr. 372.
(*d*) "Principles," 63; *vide infrà*, Observations on resulting uses.
(*e*) Ss. 26, 27, *supra*.

conferring the privilege did not exist, would be protector.(*a*) Thus, if lands are limited to A. for life, with power to lease for lives or for years determinable on lives, with remainder in tail, with remainder over;—A. leases under the power to B. for life or for ninety-nine years determinable on life, when, according to the principles on which appointments under powers operate, the estate of B. inserts itself in the settlement prior to the estate of A.;—here, the clause in question denies the protectorship to B. and preserves it in A. Care must be taken not to confound cases in which the prior estate conferring the protectorship has merely passed from the original owner to an assignee, (of which an example is given in the preceding paragraph,) with cases falling under this provision; for though the *assignee* would be excluded by one of the enactments to which this provision refers, yet the original owner would continue to be protector. But if lands are limited to A. for the life of B., remainder to C. for life, remainder in tail, remainder over, and A. dies, or aliens and dies, living B., then, as the representative or alienee of A. would be excluded, the office would be cast upon C.

—for the case of a married woman.

Where the estate conferring the protectorship is limited to a married woman, the husband and wife are jointly protectors as one owner, unless the estate be settled to the separate use of the wife, in which case the wife is sole protector.(*b*)

—for cases of incapacity.

Cases may occur in which either the office of protector is vacant, though a prior estate adequate to constitute a protector is subsisting, or the protector is rendered incompetent to exercise his functions. Such cases are provided for by a special clause,(*c*) which vests the office,

(*a*) S. 28. (*b*) S. 24. (*c*) S. 33; and see s. 48.

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where the protector is a lunatic,—in the Lord Chancellor, or the Great Seal, or persons entrusted with the care of lunatics; and where the protector is convicted of treason or felony, or not being the owner of a prior estate, is an infant, or it is not known whether he be living or dead, or where the settlor declares that the person who as owner of a prior estate would be protector shall not be protector, without appointing a protector, or where, from any other cause, notwithstanding the existence of a prior estate sufficient to constitute a protector, there shall be no protector,—in the Court of Chancery.

Power to appoint a protector or protectors.

Another important provision is that which enables (*a*) the settlor, not only to appoint any person or persons *in esse* (exclusive of aliens), not exceeding three, whether taking an interest under the settlement or not, to the office of protector, but also, by means of a power, to be inserted in the settlement, of nominating to vacancies, to perpetuate the protectorship in any person or persons *in esse*, not exceeding three, for the whole or any part of the period for which the office would have endured by force of the limitations. The person who, in respect of the prior estate, would ordinarily be the sole protector may be one of the special protectors, and, unless there is a direction to the contrary, will continue protector after the death, or resignation by deed, of the rest, until further appointment. It is presumed that the words *in esse*, where they first occur, are to be taken with reference to the execution of the settlement; and where they last occur, to the period of nomination.

Certain cases in which the protectorship has respect to the old law.

The protectorship is qualified by a saving of the old law to a certain extent from tenderness to vested rights. 1. Where, on or before the 31st of December, 1833, an estate shall have been disposed of, the person who in

(*a*) S. 32.

respect of such estate would have been the person to make a tenant to the præcipe, is during the continuance of the estate to be the protector.(*a*) It follows that if A., tenant for life, remainder to B. in tail, remainder over, conveyed his life estate to C. on or before the 31st of December, 1833, the office of protector, which, under the general provisions of the act, would remain with A. notwithstanding his alienation, will belong to C. or his assigns, who may be supposed to have calculated on the privilege of making the tenant to the præcipe. 2. So, if any person having, on or before the 31st of December, 1833, disposed of a remainder or reversion in fee, would yet, under the general provisions of the act, be the protector, then the person who would have been the person to make the tenant to the præcipe is, during the continuance of the estate which conferred the right to make the tenant, declared to be the protector.(*b*) If, therefore, A., tenant for ninety-nine years determinable on his death, (which species of chattel interest would be sufficient to constitute him the protector,) with remainder to B. for life, (who, or whose assigns, as having the first estate of freehold, would have been the person or persons to make the tenant,) with remainder to C. in tail, with remainder or reversion to A. in fee, aliened his (A.'s) remainder or reversion on or before the 31st of December, 1833, then B. and his assigns will, during the subsistence of his life estate, enjoy the office of protector; otherwise A. would, as the act expressly anticipates, have been "enabled to concur in the barring of the remainder or reversion" which he himself had aliened. In each of the preceding cases, partial alienations or dispositions, (as, for a derivative interest, or by way of mortgage,) are within

(*a*) S. 29. (*b*) S. 30.

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the scope of the saving. 3. Again, where, under any settlement made before the passing of the act, the person who would have been the person to make the tenant shall be a bare trustee, such person is, during the continuance of the estate conferring on him the right to make the tenant, to be the protector.(*a*) It is observable that the twenty-seventh section refers prospectively to the provision in question, as "the case hereinafter provided for, of a bare trustee under a settlement made *on or before the 31st of December*, 1833;" but it is apprehended that the terms of this referential reference would not be of force to control the subsequent enactment. Consequently, if, before the passing of the act, lands were limited to the use of A. for the life of B., in trust for B., with remainder to C. in tail, with remainder over, the protectorship, which, under the general provisions of the act, would have belonged to the beneficial owner (B), will reside in A. and his assigns. We have seen that the protectorship is a personal privilege, neither transferable to assigns, nor transmissible to representatives;(*b*) whereas the right of making the tenant was inherent in the seisin of the freeholder for the time being. Now, the clauses in question save entire the principle of the law in regard to common recoveries, annexing the new office to the old freeholder. It is almost superfluous to add, that in none of these instances would the person holding the office be compellable to consent. These provisions have been noticed thus particularly; because they must for many years to come exert considerable practical influence, and because they afford a striking illustration of the observation with which we set out, that a correct understanding of the learning and practice of common recoveries is essential to the

(*a*) S. 31. (*b*) S. 27.

sound exposition and safe application of the substituted system. Nay, in perusing an abstract of title some fifty years hence, (if, notwithstanding another recent law, (*a*) posterity should be permitted to look back so far into the transactions of their ancestors,) it may be necessary for the conveyancer to come prepared with a knowledge, first, of the law in regard to the making of a tenant to the writ for suffering a common recovery; secondly, of the partial system of protection based upon that learning, —its extent and duration; and, thirdly, (whether *lastly* or not must depend upon the course of legislation,) of the system of protection under the new code.

The protector not required to convey.

In comparing the new system with the old, it should not be forgotten that in order to make a tenant to the præcipe, the freeholder was obliged to depart with the immediate freehold to a stranger—a step often attended with inconvenience in practice. But, when protector, he need only *consent*, and there is consequently no disturbance of his particular estate. Thus, if the limitations be to A. for life, remainder to the first son of A. in tail, remainder over, and it be wished to acquire the fee simple in remainder immediately expectant on the limitation for life, without affecting that limitation, the first son, with the consent of A., will convey to a third person to the use of the first son in fee, or to any other uses which may be agreed upon, leaving the life estate wholly untouched. On the other hand, if it be wished to put an end to the existing settlement *in toto*, then, of course, A. will not merely consent, but will concur with his son in the conveyance.

(*a*) *Vide infrà*, stat. 3 & 4 Will. 4, c. 27.

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Prior estate and entail must be created by the same instrument.

Before we dismiss the subject of the protectorship, one circumstance, which has attracted the observation of the writer already quoted, deserves to be marked, which will be best done in his own words. "Another important accession," he observes, "to the *jus disponendi* of a tenant in tail is, that he is not required to obtain the concurrence of the owner of a prior estate of freehold, or of years determinable with life, *where such prior estate and the estate tail are created by different assurances;* for it is to be observed, that the 22d section, which imposes the necessity of obtaining the consent of the protector of the settlement, only applies 'if, at any time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, *under the same settlement*, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail;' so that if, after the 31st of December, 1833, lands were devised or conveyed to A. for life, with remainder to B. in fee, and B., by deed or will, limited his remainder to C. in tail, C., the tenant in tail in remainder, might, without the concurrence of A., the prior tenant for life, acquire the remainder in fee simple by a deed inrolled, though before the statute C. could not have suffered a common recovery, unless enabled so to do by the junction of A., the owner of the immediate freehold. It is observable, that there is no such distinction in regard to settlements made on or before the 31st of December, 1833, of which the owner of the immediate freehold (being entitled as trustee) is constituted the protector, whether, as it should seem, such freehold were created by the same instrument as the estate tail or not. [*sed quære?*] Indeed, as such cases evidently belong to the

old system, any such distinction would have been absurd." (*a*)

Effect of mortgages, and other dispositions for a limited purpose.

The assurance of the tenant in tail may be so made as to effect, (*b*) and the consent of the protector may be so given as to authorise (*c*) only a partial alienation; whereas a tenant in tail suffering a recovery with effect necessarily acquired the fee-simple absolute, although not desiring, perhaps, a total destruction of the settlement. But, with reference to this point, the act contains a special and rather singular provision. (*d*) It is well known that, by construction of equity, mortgages and other limited dispositions merely draw out the quantum of interest requisite to satisfy the particular purpose, leaving the unexhausted interest to result according to the former ownership. The act, however, attributes to such dispositions the effect of an absolute bar, in equity as well as at law, to the extent of the *estate* created, except that where the disposition creates only "an estate *pour autre vie* or for years absolute or determinable," or "an interest, charge, lien or incumbrance," without limiting a term or other greater estate, its effect, as a bar in equity, is restrained to the particular purpose; and this enactment is not controllable by any implication or declaration of a contrary intention in the deed by which the disposition is effected. It would have tended, perhaps, to uniformity and certainty, if the effect of a disposition by tenant in tail by way of mortgage, or for any other limited purpose, had been referred to the established rules of equity, which, as in the instance of a mortgage by the donee of a power, or by husband and

(*a*) 9 Jarm. Convey. 409, n.
(*b*) S. 15.
(*c*) S. 43.
(*d*) S. 21.

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wife of her estate, restrain the disposition to the particular object.(a)

Distinctions in regard to partial alienations.

According to the provision in question, it seems that a conveyance to A. in fee, or in tail, or for his *own* life, to answer a limited purpose, (as, by way of mortgage, or upon trust to sell for raising or securing a gross sum or an annuity, &c.) which conveyance would in equity leave a beneficial interest to result as undisposed of, (though the creation of an *estate tail* for such a purpose is, of course, an improbable supposition,) will bar *ex necessitate* to the same extent as if the equitable purpose had been co-extensive with the legal alienation, and, therefore, the resulting beneficial interest will be discharged from the intail; but that a conveyance to A. for the *life of B.*, or for ninety-nine years if B. shall so long live, or for a term of one thousand years, to answer a limited purpose, will bar only to the extent of satisfying that purpose, and, therefore, the resulting beneficial interest will be subject to the intail. So, if the disposition create only "an interest, lien, charge, or incumbrance," as distinguished from an "estate," the effect will be merely to let in such interest, &c. without otherwise disturbing the intail. In expounding this clause, it must be borne in mind that a disposition by an *equitable* tenant in tail, purporting to create an *estate*, though not, in legal strictness, creating any *estate* at all, (*b*) is within its purview. The words "interest, lien," &c. are rather indefinite, and as the act most expressly requires in every case a formal legal assurance, (*c*) the case of a disposition creating an "interest, lien," &c. without creating, in point of form at least, an estate, is not very likely

(*a*) Jackson v. Innes, 1 Bligh's Parl. Rep. 123, O. S.
(*b*) *Vide suprà*, 68, 87. (*c*) S. 40.

to occur. Although the tenant in tail is not permitted to contradict this enactment in terms, yet he may defeat it in effect by resettling the equity of redemption, or other ulterior interest, to the former uses.

The protectorship is defined and regulated by a series of enactments, which, as well from the variety of the modifications of which the ownership prior to the estate tail is susceptible, as from the novelty of the office of protector, may possibly be productive of some questions. It must be observed, however, that the act is throughout full and explicit in its language, not unfrequently supplying a commentary on its own provisions. (*a*)

Effect of assurance by tenant in tail, having barred the issue, but not the remainders.

Before we dismiss this head of entailed estates, it is proper to observe, that after a tenant in tail, by levying a fine, had turned his estate tail into what is called, though not, perhaps, very accurately, a base fee, or in other words, had barred the issue in tail, but not barred the remainders or reversion, he still retained the bare personal *privilege*, which descended to the issue, of rendering the bar complete by being vouched in a recovery. Now, an assurance under the act will produce, in the same state of the title, the same effect. (*b*)

—by heir in tail, living the ancestor.

But on two other points, material to titles, the law is altered. The one is the case of an heir expectant in

(*a*) The new real property acts, and indeed most of the modern acts, commence by defining the terms to be afterwards employed; not unfrequently giving several definitions to each term. Will it not sometimes be a question whether a term is employed in one of several given senses exclusively, or in which, and how many, of several given senses it is employed; and sometimes happen that it cannot be understood in any of the given senses? This practice renders it necessary for the expositor either to *look out* every word as he proceeds, or to carry the glossary in his head. No care or skill can ensure the correct and consistent application of a new vocabulary even by the inventor himself.

(*b*) S. 19. *Suprà*, 102.

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tail, whose fine with proclamations (though levied in the lifetime of the ancestor,) would have barred the estate tail in the event of its devolving upon him, or upon his issue in tail, (*a*) but whose assurance, (made in the lifetime of the ancestor,) will not have any operation under the act. (*b*) The other is the case of a base fee, and the immediate remainder or reversion in fee, centering in the same person. The *fine* of tenant in tail, having the immediate remainder or reversion in fee in himself, conferred a title, founded upon the remainder or reversion, and burthened with all incumbrances affecting the remainder or reversion;—in order to exclude the remainder or reversion, a *recovery* was necessary; but the act *enlarges* the base fee into a fee simple, to the exclusion of the remainder or reversion. (*c*) Thus,—to put a case which sometimes occurred in practice—if A., tenant in tail, with the immediate remainder or reversion in fee in himself, charged his real estate with legacies, and died, leaving an eldest son B., to whom the remainder or reversion descended, and who levied a fine with proclamations, then, in the language of the books, the estate tail was converted into a base fee, which *merged* in the immediate remainder or reversion in fee, reducing the remainder or reversion into possession, (*d*) onerated, of

—by tenant in tail, with the immediate fee in himself.

(*a*) Shep. Touch. by Prest. 21.

(*b*) S. 20. (*c*) S. 39.

(*d*) A remainder cannot be limited, by act of the party, after a fee, whether base or simple. If, therefore, land were given to A. and his heirs so long as there shall be issue of the body of B., a gift over to take on failure of such issue would be void. Such a gift would tend to a perpetuity, inasmuch as it would not be barrable by A. or his heirs. But there might have been, by construction of law, before the Fine and Recovery Act, and there may still be, by the effect of that statute, a remainder expectant on the base fee arising from an as-

course, with the legacies; whereas the recovery of B. would have substituted a new fee simple for the old estate tail and old remainder or reversion, to the exclusion of the legatees. The effect of B.'s assurance under the act is assimilated to that of the *recovery*. So, if the land be limited to A. for life, remainder to B. in tail, remainder to B. in fee, the assurance of B. (without the concurrence of A. (*a*)) will confer a perfect title to the fee simple immediately expectant on the tenancy for life, by an expansion of the estate tail. But if the land be limited to A. for life, remainder to B. in tail, remainder to C. in tail, remainder to B. in fee, the assurance of B., unless made with the consent of A., the protector, (*b*) will operate, under the act, to confer a title only to a fee determinable on the failure of issue in tail of B., and, independently of the act, to pass the ultimate remainder in fee; although if C. should afterwards die without issue, and the base fee and remainder in fee should centre in the same person, the base fee will then be enlarged, by force of the act, into a fee simple. Indeed, the act provides generally (*c*) for the enlargement of the base fee whenever it shall happen to be united with the immediate remainder or reversion in fee, whether the base fee shall have been created by fine prior to the act, or shall be created by an assurance under the act itself.

surance by tenant in tail effectual only to bar the issue. Such a remainder had not, nor has any tendency to a perpetuity, for the right of barring it was, and still is inherent in the person or persons to whom the estate tail, if subsisting, would have belonged. See "Introductory Observations" prefixed to the Forms of Disentailing Assurances, *infrà*.

(*a*) S. 34. (*b*) S. 34. (*c*) S. 39.

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Entails of copyholds, how to be barred.

V. The establishment of a better system of barring estates tail in *copyhold* land. If the intail be of the legal estate, a surrender is made necessary; but if the intail be of the equitable interest, then either a surrender, or a deed of disposition, (*a*) such deed to be entered on the Court Rolls, (*b*) may be adopted. Where there is a protector, and a surrender is necessary, the interest being legal, his consent may be given, either to the person taking the surrender, (*c*) of which, if taken out of court, the memorandum should state the consent, and be subscribed by the protector; or by deed to be produced, at or before the making of the surrender, to the steward, who is to endorse and sign a memorandum of the production, and enter the deed, with the indorsement, on the rolls, and then indorse and sign a memorandum of the entry. Where there is a protector, and a deed is adopted, the intail being equitable, the consent may be given either by the same deed, or by a distinct deed to be executed before or on the day of execution of the disintailing deed and to be entered on the rolls, which entry the lord is bound to make. (*d*) Before the act, equitable intails and remainders of copyholds were barrable by equitable customary recoveries, or (as the custom of the particular manor permitted) by equitable surrenders, but as the lord is concerned about the *legal* estate exclusively, as that alone can be the subject of tenure, he might have refused, and often did refuse, to allow an equitable owner, who, as such, was a mere stranger, to go through the necessary forms. The difficulty was yet greater in regard to the interests of married women in copyholds, but has been removed by the same statute.

(*a*) S. 50. (*b*) S. 53. (*c*) S. 52. (*d*) S. 53.

Voidable estates created by tenant in tail, either before or after the act, in favour of purchasers for value, are to be confirmed by the effect of a subsequent disposition by deed inrolled under the act, (so far as the disposition may be binding on the issue and remainder-men,) although such disposition may be made with a different or even a contrary intention, except as against a purchaser for value without express notice of the voidable estate. (*a*) This enactment is founded on the well-known doctrine of the old law, which was itself founded on a broad principle of justice.

Effect of disposition by tenant in tail in confirming voidable estates.

In order to obtain a clear and correct understanding of that portion of the act which relates to entailed estates, we should note, first, that after the statute *de donis*, tenants in tail were incompetent to alien, as against the issue or remainder-man, except by the common law stratagem of a recovery, or the statutory force (*b*) of a fine with proclamations; secondly, that the act in question abolishes those devices; thirdly, that it *enables* tenants in tail to alien in fee; fourthly, that in the case of a tenancy in tail in remainder, expectant on a particular estate or estates of a given description, it establishes a protectorship; fifthly, that it *restrains* the tenant in tail, there being a protector of the settlement, from aliening, as against ulterior takers, without the consent of the protector; and, sixthly, that it prescribes the observance of certain formalities, in regard as well to the alienation of the tenant in tail, as to the consent of the protector.

General scheme of the act in regard to alienations by tenant in tail.

It is hardly necessary to state, that the contracts of a tenant in tail, and the conveyances (fines, recoveries, warranty, and discontinuance being struck out by the

Effect of contracts and assurances by tenant in tail, not within the act.

(*a*) S. 38. (*b*) 4 Hen. 7, c. 24; 32 Hen. 8, c. 36.

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new statute law) of a tenant in tail, not being assurances within this act, retain whatever efficacy was attributed to them by the old law; or, that the operation of a fine or recovery, as a tortious or wrongful alienation, or of a fine with proclamations, as a bar by non-claim under the statutes, (*a*) will not belong to an assurance under this act.

The new law not a mere substitute for the old.

Though the basis of the new law is analogous to the old, yet the act must be considered, not as a dry substitute, but as the result of a well-digested plan, which, after expunging certain objectionable parts of the former system, at once reconstructs the remainder in an improved form, and extends the range of its utility by applying disentailing assurances, as well as the assurances of married women, to cases not contemplated or not effectually met by the machinery of fines and recoveries. Among these cases, it is conceived that we may place the case of a *contingent* estate tail. The owner of such an estate, or rather right, was deemed incompetent to suffer a common recovery with effect. The act, however, seems to embrace every species of estate tail, by enabling "every actual tenant in tail, whether in possession, reversion, *contingency*, or otherwise," to dispose, as against all claimants under the estate tail or any ulterior estate, (*b*) and by defining an actual tenant in tail to "mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant to be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right." (*c*) But this position is advanced with the diffidence created by the dissentient opinion of a very high authority upon points of this nature,

—extends to contingent estates tail.

(*a*) 1 Rich. 3, c. 7; 4 Hen. 7, c. 24. (*b*) S. 15.
(*c*) S. 1.

who, in the case of a contingent remainder in tail limited to a married woman, advised thus:—"the owner of a contingent remainder cannot bar the remainders over, even though the contingency should arise; and I do not think the new act has given more power of alienation than existed before the act. The act has not distinctly contemplated this case. My advice to the husband and wife is to make a demise for years, rather than attempt to convey a base fee derivable out of the contingent remainder (if any) in tail to the wife. To make the deed valid against the wife, whether the deed shall be for years or in fee, it must be duly acknowledged by the wife, and registered in the Common Pleas, and to make it binding on the issue it must also be inrolled in the Court of Chancery."

Repeal of former acts relating to *entailed money*.

VI.—The extension of the provisions respecting entailed land to entailed money, that is, to a money fund liable to be laid out in the purchase of land to be entailed, including land impressed with a trust for conversion into money to be so applied. The former acts are swept away, (*a*) and the person who would be the first or only tenant in tail of the land to be bought and settled, is enabled, by a deed of *assignment* inrolled in the Court of Chancery within six calendar months after the execution, (and, if there be a protector, made with his consent,) to unsettle the fund, and entitle himself (subject, of course, to any prior interests or charges,) to receive it from the trustee. (*b*) The history of the law relating to entailed money is curious. Formerly the person entitled to be tenant in tail of the land, with remainder or reversion to another, (for where the immediate re-

Mode of assurance substituted.

Progress of the law in regard to entailed money.

(*a*) S. 70. (*b*) S. 71, 72.

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mainder or reversion in fee was in himself, equity would decree payment of the fund to him, (*a*)) was in this dilemma,—he could not act upon the land, because it could not be the subject of a recovery until ascertained—he could not act upon the money, because it could not be the subject of a recovery at all. In this predicament he had recourse either to an act of parliament, or to the expedient of a colourable investment in the purchase of an estate from a friend, who in fact merely lent it till a recovery could be suffered. In order to remedy this inconvenience, an act (*b*) was passed, authorising the Court of Chancery, on the petition of the person who would be tenant in tail of the land, to order the fund to be paid to him; the takers of antecedent estates, if any, concurring. When this act came to be carried into execution, it was thought proper that there should be a reference to the master to inquire whether the petitioner was entitled to be tenant in tail, and whether he had incumbered the fund or not. (*c*) The result of this practice, in a case which fell under the writer's observation, was that a petitioner, with a clear title to a fund of £400 consols, obtained, after deducting the costs of the proceedings, rather more than half that sum. Common sense dictated that the order of the court should have the effect of unsettling the beneficial interest in the fund, leaving the tenant in tail, who had thus acquired the disposable property in the fund, to obtain it in the

(*a*) Short *v.* Wood, 1 P. Wms. 471; 2 Atk. 454.

(*b*) 39 & 40 Geo. 3, c. 56, re-enacted, with alterations, by 7 Geo. 4, c. 45.

(*c*) 6 Ves. 116, 576. An order made in vacation was not effectual unless the tenant in tail lived till the second day of the ensuing term, 5 Ves. 12, n. *Vide suprà*, 109.

ordinary course from the trustee, who, unless there was some apparent reason for withholding it, would be advised to pay it without the sanction of a decree; just as an equitable recovery unsettled the beneficial interest in land equitably entailed, and gave to the tenant in tail the right of calling for the legal fee simple. The new law, by dispensing altogether with the slow and costly agency of the court, and adopting the principle just stated in its fullest extent, pronounces a tacit condemnation on the former act and the practice engrafted upon it.

VIII. Mode of assurance substituted for binding *married women*.

VIII.—The substitution, for passing the estates and extinguishing the rights (*a*) and powers of married women in, to, or over land, and money to be laid out in land, of a deed (*b*) to be acknowledged before a Judge or a Master in Chancery, or certain standing commissioners, (*c*) or, in the case of absence abroad, &c. special commissioners (*d*) to be appointed under the act, by whom she is to be examined in order to ascertain that her consent is freely and voluntarily given. The precautions superadded to the simple interrogatory of the old law, by a late rule of the Court of Common Pleas (*e*) in regard to the examination of married women, receive no countenance from the legislature, and it was hoped that the court would not so exercise the discretionary power of making orders, confided by the act, (*f*) as to revive enquiries, which, in order to be effectual, must be dilatory and inquisitorial. But this hope has been disappointed. During the short space which has elapsed

(*a*) As to dower, *vide infrà*.
(*b*) S. 77.
(*c*) Ss. 79, 80, 81, 82.
(*d*) S. 83.
(*e*) Easter T. 8 Geo. 4, 4 Bingh. 248.
(*f*) S. 89.

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since the act came into operation, no less than three sets of rules or orders have successively appeared, all leaning apparently to the practice and prepossessions of the old law, rather than conceived in the spirit, or even deferring to the letter of the new statute. (*a*) The certificate of acknowledgment being filed of record, the deed takes effect by relation as from the time of the *acknowledgment*. (*b*) Where a married woman is tenant in tail, her assurance must, of course, also conform to the previous provisions of the act relative to estates tail. In every case her husband's concurrence is required, (*c*) but subject to a discretionary power vested in the Court of Common Pleas, (*d*) of dispensing with his concurrence under certain special circumstances of incapacity, separation, &c. (*e*); and in every case, except that of her merely consenting as protector, the deed of a married woman, in order to be operative under the act, must be acknowledged. (*f*) With respect to legal estates in *copyholds*, the provision enabling married women to dispose of lands by deed, is confined to cases in which the disposition could not, before the passing of the act, have been effected by surrender. (*g*) The difficulty already stated to have existed before the act in regard to the passing of the equitable interests of married wo-

—in respect of their interests in copyholds.

(*a*) "In issuing the rules in question, the Judges of the Common Pleas have certainly put a most liberal interpretation upon the passages in the act which confer their regulating power; and in the exercise of that power, have fettered the taking of acknowledgments with restrictions at once inconvenient and ineffectual for the purpose at which they aim." 9 Jarm. Conv. 486, n. *Vide infrà*, notes to the Rules.

(*b*) S. 86.
(*c*) S. 77.
(*d*) S. 91.
(*e*) Ex parte Mary Gill, *suprà*, 89, n.
(*f*) S. 79, 45.
(*g*) S. 77.

men in copyholds is removed by a provision, which not only enables married women to pass such interests by deed acknowledged, but directs that on their surrender of such interests they shall be separately examined in the same manner as if the estate had been legal, declaring as well such surrenders as all surrenders antecedently to the act and similarly circumstanced (the separate examination having been taken) to be valid. (*a*)

The act embraces other objects.

The above sketch is confined to the more prominent points of the act, which consists of ninety-three sections. But the substance of the principal enactments has been exhibited, with the exception of that portion of the statute which repeals the former law relating to bankrupt tenants in tail, and substitutes other provisions, too numerous and too special to be introduced here, and for which, therefore, the reader is referred to treatises devoted to the law of bankruptcy.

Liability, as between vendor and purchaser, to the expence of an assurance under the act.

One of the first points likely to arise in practice upon the act, is in regard to the expense, as between vendor and purchaser, of an assurance to pass or bind the interest of a married woman, or to defeat an intail. The vendor must, it is conceived, bear the expense of the formalities superadded by the act to the ordinary conveyance of the purchaser, where the object can be properly effected by that conveyance; or, where a separate assurance shall be requisite, the whole expense of such assurance.

General merits of the act.

This act, though partaking of the imperfections from which an original effort to grasp a subject so various, complex and extensive cannot hope to be exempt, and though not a little blemished by parliamentary grafts, contains at least the materials of a

(*a*) S. 90.

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complete system. If, after the experience of a few years, it were carefully revised and re-enacted, this branch of the law would probably be settled on a sure foundation. It would not have been possible, perhaps, to construct a new system more conservative of the general principles of the old. While the act abrogates two of the common assurances of the realm, it abstains from introducing any novel mode of conveyance; (*a*) and, far from tending to impair the wholesome aristocratical influence exerted by the ancient law of settlements, it throws down the barrier of obsolete technicality only to discover a species of protection equally efficient and more susceptible of rational and extensive application.

—how estimated by the profession.

In conclusion, the reader may be gratified to learn the sentiments of competent judges on the merits of the new law of alienation by tenants in tail and married women. In treating of the Fine and Recovery Act, one distinguished writer thus expresses himself:—"The sweeping away of fines and recoveries is a solid improvement in the law, and the act of parliament is a masterly performance, and reflects great credit on the learned conveyancer (*b*) by whom it was framed. But the policy of the provisions in the act may be doubted. All men's titles must for many years depend upon the law of fines and recoveries; and few will be found in a short time competent to judge of their validity. The substitute for the old law is one of vast complication, introducing a protector in every settlement to check the alienation by tenant in tail in remainder. Whilst we brush away our old books, no one can doubt that the new system, from its complica-

(*a*) *Vide infrà*, Prec. and Notes, for Forms and further observations on the act.

(*b*) *Vide suprà*, 98, n.

tion, will lay the foundation for new ones, and that the construction of the act in every given case will not be settled but after a long run of litigation, although no doubt, at first, every thing will proceed smoothly. The author was one of those who thought that the law would have been more simple if it had merely abolished fines and recoveries, and made deeds to declare the uses of fines, and to make tenants to the *præcipe* in recoveries effectual without actually levying a fine or suffering a recovery. The act has effected an important alteration in the law, by making the tenant for life continue to be the protector of a settlement even after he has sold the estate, or it has passed from him by bankruptcy or insolvency. This appears to be unwise. For the act takes away the control of equity over the protector; declares that his discretion is absolute; that he cannot commit a breach of trust; and that the doctrines of equity applicable to a donee of a power dealing with an object of the power are not to be applied to him. He may, therefore, make what bargain he pleases with the tenant in tail after the *natural* check (for such the possession of the first estate may fairly be considered) has been conveyed away. In the case of a bankrupt, he may acquire a great property as against his creditors, and a case may occur in which he may by his concurrence enable the first tenant in tail to bar a subsequent remainder vested by his bankruptcy in his own assignees."(*a*)

Another commentator on the statute, to whose work reference has already been made, observes, that "the care and skill displayed in the penning of its numerous provisions have extorted the warm and candid praise of a writer of the highest legal celebrity, though entertain-

(*a*) 1 Sugd. Vend. 9th ed. 387.

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ing an unfavourable opinion of the policy of the measure. The act, indeed, is one of the most complete of any of the legislative amendments of the law of real property passed in the last session, which appear to possess very unequal degrees of merit."(*a*)

FINES AND RECOVERIES, (*Ireland,*) 4 & 5 Will. 4, c. 92. (*Royal Assent, Aug.* 15, 1834.)

The act on which we have been commenting does not extend to Ireland,(*b*) except in those instances (*c*) where Ireland is expressly mentioned. But the legislature has since passed "An Act for the abolition of Fines and Recoveries, and the substitution of more simple modes of Assurance in *Ireland.*" This act differs in some respects from the English act, and it may be useful to state shortly a few points of difference. In the definitions (*d*) the word *estate* is made to extend to "any interest, charge, *right, title,* lien, or incumbrance, in, upon, to, or affecting lands, *whether present or vested, future or contingent.*" The additional words were introduced from an anxiety, probably, to satisfy the scruples of those who doubted the applicability of the English act to inchoate and contingent interests, as the wife's title to dower, or the benefit of a contingent or executory limitation. The ancient demesne sections of the English act are excluded, along with that branch of the fifth section which establishes fines and recoveries, notwithstanding any defect or want of jurisdiction in the court. The omission of the latter clause seems to be judicious. On the other hand, the Irish act contains a provision (*e*) entirely novel, and apparently foreign to the professed objects of the act. This provision did, indeed, find its way into the English bill,

Points in which the Irish Fine and Recovery Act differs from the English.

(*a*) 9 Jarm. Conv. 415. (*b*) S. 92.

(*c*) As to bankrupts, ss. 45, 68, 69. As to entailed money, s. 72. As to acknowledgment and inrolment of deeds, ss. 73, 74, 75.

(*d*) S. 1. (*e*) S. 22.

Interpolated clause relative to contingent and executory rights.

but was, when discovered, very properly ejected. It is not conceived in the clearest terms, but it purports to enable any person, either before or after he shall become entitled, otherwise than as expectant heir of a living person, to an estate in lands not vested, and whether he be ascertained as the person or one of the persons in whom the estate may become vested or not, to dispose by deed, will, or otherwise, as if the estate were vested in possession; but no such disposition is to be valid, where the person making it shall not then have become entitled, unless the instrument under which he claims be then in actual operation. It would require an extended dissertation to develope all the possible bearings of this singular clause. The owners of contingent remainders and executory gifts cannot alien by assurance *inter vivos* at law, except under the doctrine of estoppel, though they may bind their interests by way of contract in equity. Thus, if lands stood limited to A. for life, remainder to B., if he shall survive A., in fee, or to A. in fee, but if A. shall die under twenty-one, then to B. in fee; in neither case would a conveyance by B. pass the benefit of the contingent limitation, so as to vest the estate, on the happening of the contingency, in the grantee at law, though his devise by will would so pass it at law, or his agreement would bind it in equity. And even, with reference to the devisable quality of contingent and executory interests, an eminent writer observes, that "the decisions do not appear to reach those cases, where neither the contingent interest itself is transmissible from any person until the contingency decides him to be an object of the limitation, nor the person or persons, to or amongst whom the contingent or future interest is directed, is or are in any degree ascertainable, before the contingency happens; as in the case of a contingent or executory limitation to the right heirs of J. S.

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(then living) where the description of the person to take cannot be confined to or among any ascertainable person or persons, during the life of J. S.; nor can it therefore be said, in whom such interest is; nor, consequently, that it is in any body, during that period; nor will it be transmissible or descendible, from any one dying before it becomes vested."(*a*) With deference to such authority, it is conceived that it cannot, in the case of any contingent limitation, be predicated of any person that he is the object until the contingency decides him to be such, or that he is the person to whom the contingent or future interest is directed; nor is it admitted that a limitation to the survivor of a thousand persons, or to the right heirs of I. S., is more or less contingent, in point of law, than a limitation to A. if he shall survive B. In none of these cases, can it be said that the legal interest is in any body during the contingency. (*b*) The clause in question seems, however, to have been framed with an eye to the supposed distinction, and to contemplate the extension of the power of disposition to every species of contingent and executory interest, except the mere expectancy, or, in other words, the hope of succession of an heir apparent or presumptive, which is not the character of the contingent right under a gift to the right heirs of a living ancestor as purchasers. But if the law in regard to the transferable or devisable properties of contingent and executory interests was defective or doubtful, it should have been corrected and explained by an independent and well-considered enactment. This clause, so entirely misplaced and so darkly worded, is a striking specimen of the worst kind of legislation. With equal propriety the clause might have been

(*a*) Fearne's Cont. Rem. 8th ed. 370, 71.

(*b*) 1 Jarm. Pow. on Devises, 30, n.

extended to choses in action, which are not assignable at law. The provisions relating to copyholds are omitted as being (like the ancient demesne clauses) inapplicable to Ireland. The discrepancy as to dates already pointed out (*a*) as existing between the twenty-seventh and thirty-first sections of the English act is repeated in the Irish act; (*b*) and, what is more to be regretted, the Court of Common Pleas in Dublin is invested with the same power of making orders as that which is conferred by the English act, and which has been so unfortunately exercised.

DOWER. 3 & 4 Will. 4, c. 105. (*Royal Assent, Aug.* 29, 1833.)

We now proceed to the ACT FOR THE AMENDMENT OF THE LAW RELATING TO DOWER. Neither is this act calculated to effect any considerable change in the forms of conveyancing. While, under the old law, the husband was entitled to be tenant by the curtesy in respect of his wife's inheritance, whether legal or equitable, dower was strictly a legal demand, and did not attach unless the husband was solely seised in possession of the legal inheritance. It was, therefore, commonly excluded on a purchase of the fee by conveying so as to vest a legal estate of freehold, derived out of the fee, in a trustee for the purchaser, or so as to vest the legal freehold or fee in the purchaser and a trustee for him jointly. According to the most approved form of uses to prevent dower, the estate was limited to such uses as the purchaser should by deed appoint, (this power, however, not being essential to the object of preventing dower,) and in default of appointment, to the use of the purchaser for life, with remainder to a trustee his executors and administrators during the life of the purchaser, in trust for him, with remainder to the purchaser in fee. In practice,

Modes of excluding dower under the old law.

(*a*) *Supra*, 114. (*b*) Ss. 25, 29

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this form of limitation was not attended with any inconvenience, for as an execution of the power of appointment defeated the subsequent limitations, including that to the trustee, his concurrence on the occasion of a future sale or mortgage was not necessarily required; and as the power afforded the means, not only of making a short conveyance by appointment alone, but also, it should seem, of excluding judgment creditors, (*a*) (at least, where the judgment is entered up adversely,) it was always a desirable species of dominion. If the purchaser did not execute the power, the interposed limitation to the trustee, by dividing the ownership of the legal inheritance, prevented dower, without sensibly abridging the dominion of the purchaser. The limitations may be comprised in very few words. Serious exceptions, however, had been taken to this state of the law. In the first report of the Real Property Commissioners it was observed upon in these terms:—"Dower has long ceased to be the provision for widows, but their legal right to it remains in its ancient strictness. To evade this, and to make obsolete law bend to modern usage, there are introduced into every conveyance upon a purchase of land, limitations which not only *swell its bulk*,(*b*) but sometimes lead to many inconvenient consequences." This passage can apply only, as it regards the increase of bulk, to limitations loaded with unnecessary verbosity, and as it regards the inconvenience, to those exploded forms of limitation by which the estate was vested in the purchaser and his trustee as joint-tenants, without any previous power of appointment. The only objection of any real weight is that in regard to covenants in appointments to uses not

(*a*) Doe d. Wigan *v.* Jones, 10 Barn. & C. 459.
(*b*) *Vide infrà*, Prec. No. 31.

running with the land;(*a*) a subject which demands legislative consideration.

In subjecting equitable interests to dower, the act corrects the old anomaly and introduces new.

By the new law, the anomalous distinction between dower and curtesy is abolished, and the right to dower is made to attach "*in equity*" upon the beneficial interest in possession of a sole owner of the inheritance, whether the ownership be exclusively equitable, or be in part composed of a legal estate enjoyed beneficially.(*b*) Thus, if the legal estate be vested in A. in fee, in trust for B. in fee or in tail; or be vested in B. for life or for one thousand years, remainder to A. in fee, in trust for B. in fee or in tail; or be vested in A. for the life of B. or for one thousand years, in trust for B., remainder to B. in fee or in tail;—in each of these cases the wife of B. will be dowable. It was requisite to provide expressly for the case of the mixed ownership, since the legal ownership of B. under the limitation to him was not the subject of equitable cognizance, while the equitable ownership under the limitation in trust for him was not the subject of legal cognizance; so that an enactment merely declaring that dower should attach as well to the equitable as to the legal inheritance would not have hit the case. But with respect to curtesy, the law remains unaltered, and it should seem that where the legal estate is vested in A. for the life of B., a married woman, in trust for B., remainder (legal) to B. in tail or in fee; or where the legal estate is vested in B. (a married woman) for life, remainder to A. in trust for B. in tail or in fee, the husband is not entitled to curtesy, inasmuch as the wife is not seised in possession for an estate in fee-tail or fee-simple in contemplation either of law or of equity, but to each tribunal belongs exclusively the jurisdiction over a

(*a*) 2 Sugd. Vend. 9th ed. 78; Hayes's Concise Conv. 31.
(*b*) S. 2.

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portion of her compound inheritance. Thus, it would appear that the legislature in extirpating one anomaly has established two anomalies: first, by referring a subject, in part purely legal, to the exclusive cognizance of equity; secondly, by admitting the wife to dower under circumstances which do not entitle (or, at least, cannot, without some sacrifice of principle, be held to entitle) the husband to curtesy. For, "a construction that should unite the two dissimilar estates and blend them in one, seems to belong to a court having jurisdiction to give an equitable estate all the qualities or properties of a legal one, or of reducing a legal estate to the qualities and properties of a mere equitable one; or, in other words, of annihilating their difference, and converting an equitable into a legal, or a legal into an equitable estate; which seems to be the province neither of a court of law nor of a court of equity." (*a*) Considering how long curtesy was preferred to dower, the adoption of a converse rule may, perhaps, be deemed only a fair measure of retribution. But "dower in equity" out of the mixed ownership seems hardly consistent with the constitution of our judicature. Whether the husband's beneficial inheritance be made up of the legal ownership of a particular estate in possession and the equitable ownership of the inheritance in remainder, or of the equitable ownership of a particular estate in possession and the legal ownership of the inheritance in remainder, the right of dower will attach "in equity," and in equity only. It follows that the common uses to prevent dower will not (unless the power of appointment be exercised,) exclude the dower of women who are within the act.

Actual seisin of the husband not requisite.

An actual seisin of the husband is rendered unnecessary, for if he have a right of entry or of action, in respect

(*a*) Fearn. Cont. Rem. 8th ed. 58.

of an estate to which dower would be incident, his widow will be dowable, provided she assert her claim within the period limited by law for enforcing the right of entry or of action. (*a*)

The husband's disposition effectual against dower.

But the essential alteration effected by this act consists in conferring upon the husband the power of disappointing his wife of dower by any disposition, to be made either *inter vivos* or by will, (*b*) (his disposition, to the extent of the estate, interest, or charge conveyed or created, being declared effectual against the right of dower,) or by an express declaration negativing the right of dower, to be inserted either in the *deed* of conveyance to him, or in any other *deed* to be executed by him, or in his will, (*c*) or impliedly by devising to the wife *any* land, or *any* estate or interest in *any* land, out of which she would be dowable;—and it is observable that such a devise will exclude her from dower out of *all* the lands of which he may die seised in tail or in fee. (*d*) As the clause rendering a declaration effectual seems to contemplate lands *devisable* by the husband, a question may be raised whether it extends to entailed lands or not.

Saving of rights of women married on or before 1st Jan. 1834—its practical consequences.

The operation of the act is so far limited by the concluding section (*e*) as to leave wholly unaffected the dower (i. e. the rights of all persons in respect of the dower) of every *widow* married on or before the 1st January, 1834, (i. e. every woman married on or before that day, and being or becoming a widow.) In short, women married on or before that day are remitted, for all purposes connected with dower, to the old law. (*f*)

(*a*) S. 3.
(*b*) Ss. 4 and 5.
(*c*) Ss. 6 and 7.
(*d*) S. 14.
(*e*) S. 9.

(*f*) In consequence of certain floating doubts this view of the act was originally put forth with some hesitation. But those doubts are now dissipated. An eminent writer observes, "it must be borne in

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This saving clause, which continues to a large class of wives the old provision, and to the lawyers their old devices for evading it, will have the effect of prolonging the practice of inserting limitations to prevent dower in purchase deeds and in wills devising estates in fee; for where the purchaser or devisee shall have a wife living, to whom he was married on or before the given day, limitations to prevent dower will be requisite still. Indeed, in order to prevent the necessity of inquiring, for the purposes of title, into the fact and time of marriage, it should seem that the better plan, in every case, will be to insert the ordinary uses, (*superadding* the declaration required by this act, in order to exclude, in all events, the dower of a *wife* taken *after* the 1st January, 1834,) until the lapse of years shall, in the course of nature, have exhaused the objects of legislative concern; nor, when that indefinable period shall arrive, will it be proper to discard the power of appointment, unless in the interval it be rendered worthless by some alteration in the modes of conveyance, or by a fundamental change in the system itself. So, where a vendor, seised of the legal inheritance, shall have a wife living, to whom he was married on or before the 1st January, 1834, it will be requisite either to extinguish her right of dower by a deed perfected with the solemnities prescribed by the Fine and Recovery Act, or to exclude it by the assignment to a trustee for the purchaser of a term created before the dower attached. (*a*) The right of dower, in regard to women married *after*

mind that as to widows within the exception, their rights are saved in estates acquired by their husbands even after the 1st Jan. 1834. The right of dower of women married after the 1st Jan. 1834, is placed on altogether a different footing." 1 Sugd. Vend. 9th ed. 364.

(*a*) Mole *v.* Smith, 1 Jac. & W. 665; 1 Jac. 490.

the 1st January, 1844, is by this act reduced to a shadow, and it may be questionable whether the legislature has not displayed more seeming gallantry than real wisdom by abstaining from the total abolition of that inconvenient and unsatisfactory species of provision.

Unfounded doubts relating to dower under the new law.

The condition of married women under the new law, with reference to dower, has produced more controversy than any other point connected with the subject of this chapter. How far the doubts which produced it had any real foundation, will be seen from a brief statement of two questions which have been the most agitated. 1. A doubt was started whether a woman married on or before the 1st Jan. 1834, can extinguish her title to dower by a deed acknowledged according to the Fine and Recovery Act, and, indeed, whether that act extends to dower in its inchoate state. There seems to be no ground for any such doubt, which, if it turn upon the supposed inadequacy of the words "estate, interest," &c. to include the wife's title to dower, is really idle, since the word INTEREST "*ex vi termini* in legal understanding" (and *a fortiori* in the construction of an act of parliament of this description) "extendeth to estates, rights, and titles that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them;"(*a*) and if it turn upon any supposed repugnancy between the Fine and Recovery Act and the Dower Act, is, if possible, still less deserving of serious refutation. The former act merely abolishes the old mode, and substitutes generally a new mode of assurance by married women; the latter act dispenses, to a certain extent, with the necessity of any conveyance by the wife. To *every* case in which a conveyance by the wife is or shall be requisite, the substituted assurance applies. This doubt derives more countenance than it seems to

—whether a title to dower is within the Fine and Recovery Act.

(*a*) Co. Litt. 345, 346.

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deserve, from the remark of a writer of high authority, that "the 3 & 4 Will. 4, c. 74, s. 77, *may* be *held* to extend to dower so as to enable a married woman to destroy it, but does not in expression accurately embrace it."(*a*)

—whether husband's declaration will exclude wife's dower out of lands acquired after 1st Jan. 1834, where the marriage took place on or before that day.

2. It has been contended that the dower of a woman married *on or before* the 1st of January, 1834, out of lands purchased by the husband *after* that day, may be excluded by a declaration (and, as a consequence, by alienation, &c.) under the Dower Act. In order to support that proposition, the last section (*b*) must be expounded thus:—"this act shall not extend to any *title of dower which shall have attached or shall attach* on or before the 1st of January, 1834," instead of—"this act shall not extend to the dower of any *widow who shall have been or shall be married* on or before," &c.; and the question will be, not when the woman was married, but when the dower first attached—a question not of extrinsic *fact*, but of *title*. According to this exposition, (which entirely changes the language of the enactment,) if, on or before the 1st of January, 1834, land was limited to A. for life, remainder to the husband in fee, or to A. and the husband as joint tenants in fee, and A. died after that day, living the husband and wife, the dower *then* first attaching might be excluded by the declaration or alienation of the husband, &c., though the wife may not unreasonably be presumed to have calculated on the contingency of the husband's becoming seised solely, or seised in possession. It would not be possible to distinguish

(*a*) 1 Sugd. Vend. 9th ed. 344; *vide infrà*, Prec. No. 31, n.

(*b*) "And be it further enacted, that this act shall not extend to the dower of any widow who shall have been or shall be married *on or before* the 1st day of January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created *before* the said 1st day of January, 1834, the effect of defeating or prejudicing any right to dower." S. 14.

between such cases and the common case of an original acquisition by purchase after the 1st of January, 1834. The construction must be either with reference to the time when the marriage was contracted, or with reference to the time when the dower attached. On the other hand, if titles of dower, attaching after the 1st of January, 1834, of women married on or before that day, cannot be defeated by a declaration, &c. under the Dower Act, it seems to follow that such women cannot claim dower in equity under the act. It would not, indeed, be just or reasonable that they should be allowed to take the benefit of the provision made by the act, except upon the terms imposed by the act—that they should claim at once under and in opposition to the same law. It must be admitted that the concluding section of the Dower Act is obscurely worded, and open to different constructions; but the sound conclusion seems to be, that the new law of dower was made for women *married after* the 1st of January, 1834, *exclusively*. This construction offers no violence to the letter of the act, while, for all practical purposes, it draws a broad and intelligible line of demarcation. The first branch of the section excepts out of the act *women* married *on or before* the 1st of January, 1834: the second branch restricts the operation of the act, as to women left within the act, to *instruments and acts* executed and done *on or after* that day. The natural import of the words is—" that none of the effects attributed by this act to the declaration &c. of the husband, shall belong to any such declaration &c. made &c. *before* the 1st of January, 1834;"—but the act has attributed no effect, or rather has denied effect to the declaration &c. of the husband in regard to women married on or before that day. That construction is the best, which, without departing from the words, gives a reason-

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able and consistent operation to both branches of the section. If, by a stretch of implicative construction, the clause be read as *affirming* the efficacy of a deed &c. executed &c. *on* or after the 1st of January, 1834, to defeat or prejudice *any* right of dower, how is that reading to be reconciled with the previous saving of rights of dower attaching *on* or before the 1st of January, 1834? The interpretation in question would have been dismissed with a brief notice, if the writer had not been informed of attempts made, under the sanction of respectable advisers, to enforce its adoption in practice. In order to meet, without appearing to countenance the doubt upon the point last discussed, the declaration may be thus expressed :

Form of declaration excluding dower.

"And the said [*purchaser*] hereby declares that no woman who shall become his widow, and who shall not be excluded from dower out of the said hereditaments and premises by the effect of the limitations hereinbefore contained, [*or*, and who, but for this declaration, would be dowable out of the said hereditaments and premises,] shall be dowable thereout."

Opinions concerning the Dower Act.

This measure has not been well received by the profession. "There appears to have been no sufficient ground," observes the eminent writer already quoted, (*a*) for this alteration of the law. The wife's ancient right of dower has been in effect taken away. And surely it is inconsistent, whilst you enable the husband in every case to defeat it, to extend the right over equitable estates. The first clause of the provision, No. 3, (*b*) was suggested by the author, and was, by the desire of Lord Eldon, introduced into a bill for altering the statute of limitations, brought into the House of Commons by the present Vice-Chancellor, when he was a member of that House. It was no infringement upon the right of the wife, for as the

(*a*) 1 Sugd. Vend. 9th ed. p. 366. (*b*) S. 6.

husband might have limited the estate to uses to bar dower, so as to prevent dower from attaching, there was no reason why his simple declaration should not have the same operation; and the object was to prevent the unnecessary creation of powers. But the vesting of a power in the husband to defeat the wife's right after it has attached must be defended upon different grounds."

Free-bench.

The act is silent as to free-bench, the right to which does not, unless by the special custom of the manor, attach in the lifetime of the husband, nor consequently interfere with his dominion over the customary estate.

DESCENTS. 3 & 4 Will. 4, c. 106. (*Royal Assent, 29th Aug.* 1833.)

Admission of lineal ancestry, half-blood, and attainted blood.

The ACT FOR THE AMENDMENT OF THE LAW OF INHERITANCE, by admitting the lineal ancestry, the half-blood, and persons claiming through an attainted ancestor, has removed what were considered as blemishes in our system of descent; and it has likewise amended the law of descent in some other particulars.

Devise to heir, and limitation to grantor, to confer an estate by *purchase*.

This act reverses a rule familiar to the conveyancer, by providing that, under a devise to the testator's heir, he shall in every case be *in* as devisee, and not by descent; and that under a limitation to the grantor, or to the heirs of the grantor, he shall be *in* by *purchase*, and not merely as restored to his old dominion.(*a*) The fee taken under the devise or limitation will therefore be a new acquisition, and descend from the heir or grantor as the first purchaser.

The aberrations in the old table of descents demanded less imperatively than the condition of many other branches of real property law, the interference of the legislature; for however much they might offend in theory, yet, under correction of that ample power of dis-

(*a*) S. 3. *Vide infrà*, Prec. No. 2, n. (9).

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position which is enjoyed by every owner of a descendible estate, they were in a great degree neutralized in practice. So far, indeed, as the peace and well-being of society are concerned, it is often immaterial upon what principle a dry rule of property, the result of positive institution, is settled, though it is always material that the rule should be certain and known. In refining on such rules, we are apt to catch at the shadow of abstract perfection, and lose the solid advantage of an established canon.

The scantiness of these remarks on so important a statute is supplied by the annexed TABLES OF DESCENT, in which an experienced contributor has exhibited the effect of the new law, in contrast with the old, and has furnished the practitioner, engaged in tracing an heir at law, with a safe and perspicuous guide.

CREDITORS. 3 & 4 Will. 4, c. 104. (*Royal Assent*, 29*th Aug.* 1833.)

Real estates subjected to simple contract debts.

The ACT TO RENDER FREEHOLD AND COPYHOLD ESTATES ASSETS FOR THE PAYMENT OF SIMPLE AND (*a*) CONTRACT DEBTS, constitutes the freehold, customary-hold, and copyhold estates of every deceased proprietor, not charged by his will with the payment of his debts, assets, to be administered in equity, for the payment of his debts, as well simple contract as specialty. But preference is given to creditors by specialty binding the heirs;—and heirs are not bound by bond or covenant unless expressly mentioned. This enactment will not throw any impediment in the way of alienation. A purchaser from the heir or devisee will not be liable to see his money applied in payment of the *debts*. On the other hand, the act will not operate, like a charge of debts created by the testator, to exempt the purchaser from liability to see his money applied in payment of *legacies*

Liability of purchaser as to application of purchase-money.

(*a*) *Dele* "AND."

charged by the will.(*a*) The real estate of *traders*, within the bankrupt laws, was liable under a former act.(*b*) Lands *charged* with debts will still be equitable assets to be administered upon the equitable principle of equality.

LIMITATION OF ACTIONS. 3 & 4 Will. 4, c. 27. (*Royal Assent*, 24*th July* 1833.)

The ACT FOR THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY, AND FOR SIMPLIFYING THE REMEDIES FOR TRYING THE RIGHTS THERETO, though entitled, perhaps, in point of public interest and importance, to hold the first place, is here considered last, because it has no direct bearing upon the subject-matter of this work, except that, by sweeping away the mass of real and mixed actions,(*c*) and reducing, in effect, the remedies for the recovery of land to the ordinary action of ejectment, it has facilitated future innovations upon the law of tenure. The effect of a descent cast, a discontinuance, or a warranty, in taking away a right of entry or defeating a right of action, is also abrogated.(*d*) The conveyancer was often called upon to consider the doctrine of discontinuance. Discontinuance by tenant in tail might be produced by various modes of assurance—by fine, feoffment, common recovery, release with warranty—but was more commonly the result of a fine. If a tenant in tail seised in possession (and it was lately adjudged that a tenant in tail in remainder expectant on a term of years, was for this purpose seised in possession,) (*e*) levied a fine *sur conusance de droit come*

Abolition of real actions, discontinuance, &c.

(*a*) Horn v. Horn, 2 Sim. & S. 448.

(*b*) 47 Geo. 3, sess. 2, c. 74, re-enacted 1 Will. 4, c. 47, s. 9.

(*c*) S. 36; *sed vide* ss. 37 and 38.

(*d*) S. 39.

(*e*) Doe, dem. Cooper, v. Finch, 4 Barn. & Adolph. 283; 1 Nev. & Mann. 130, *S. C.* more fully reported. This case ended in a compromise.

ceo, &c. (with or without proclamations), the fine operated as a discontinuance, turning the estates of the persons entitled in remainder or reversion to rights of action, as distinguished from rights of entry, or, in other words, such persons were precluded from recovering, on the accruer of their rights, by ejectment, and were driven to proceed by *formedon*—one of the real actions abolished by this act. If real actions had been abolished, without altering the doctrine of discontinuance, a feoffment by tenant in tail in possession, unattended with the requisites of the late act for abolishing fines and recoveries,(*a*) would in effect have barred claimants in remainder and reversion.

A stricter limitation imposed.

By this act the time allowed by the old law for making an entry or bringing an action, is on the whole considerably abridged.(*b*) If the former statutes indulged the dilatory claimant with too long a repose, and held out encouragement to stale demands, it may be thought that the new act sometimes approaches the contrary extreme, and is calculated to confer a legislative title by surprise. Under the old law, a party might have slept long and soundly upon his rights; but under the new law, even a nod may be fatal. Indeed, it should seem that cases of hardship may arise; but the quieting of possessions has ever been the care of the legislator and the judge, who have promoted it by various enactments and devices—by non-claim, warranty, &c.—the abolition of which must be set off against the rigour of the new statute.

The want of an express limitation to suits in equity, &c. supplied.

This act not only provides a stricter limitation for cases falling within the provisions of the former acts,

(*a*) *Suprà*, 97.

(*b*) See the periods stated *infrà*, p. 154; and see Table, *infrà*, p. 169.

but supplies in other cases the want of an express statutory limitation, particularly with reference to equitable titles (*a*) and to advowsons (*b*);—and, though the title and general tenor of the act would seem to contemplate real property only, yet the word "legacy" has crept in, (*c*) and standing unexplained, appears to embrace every gift of a legatory nature. Analogy, in some instances, and presumption, in others, furnished a virtual limitation where none was prescribed by the letter of the old statutes; but the courts are now relieved from the necessity of taking those indirect courses. The bar to equitable claims is not, however, susceptible of the same certainty and precision as the bar to legal claims, and a large discretion must still belong to the judge in cases involving questions of fraud, acquiescence, and other matters peculiarly of equitable cognizance. (*d*)

Effect of enjoyment under defective assurances by tenant in tail in conferring a title,

This act contains a provision (*e*) in regard to defective assurances by tenants in tail, which it is material to consider. The substance of the enactment is, that an assurance by tenant in tail, not sufficient to bar estates lying behind the estate tail, but followed by possession or enjoyment under the assurance for twenty years after the earliest period at which *a valid assurance of the like nature*, if then made by the tenant or issue in tail, would (i. e. *but* for the defective assurance), *without the consent of any other person*, have barred the ulterior estates, shall be, and be deemed to have been, sufficient to bar

(*a*) Ss. 24, 28. (*b*) Ss. 30, 31, 332, 333.

(*c*) Ss. 40, 42. See 1 Sugd. Vend. 9th ed. 411, n.

(*d*) Ss. 25, 26, 27. For the doctrine of limitation (by analogy) to suits in equity, see the great case of the Marquis of Cholmondeley *v.* Lord Clinton, 2 Jac. & W. 1; 4 Bligh's Parl. R. 1.

(*e*) S. 23.

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the ulterior estates. This provision has a prospective, as well as a retrospective aspect, applying not only to defective assurances under the old system of common recoveries, but to defective assurances under the new system of assurances by deed inrolled. Suppose, for the sake of illustration, that in 1800, the land being settled upon A. for life, remainder to B. in tail, remainder over, B., without the concurrence of A. in making a tenant to the præcipe, suffers a recovery and limits the use to C., a purchaser, in fee; A. dies in 1810, (when, of course, B. or his issue in tail would have been in a situation to suffer an effectual recovery "without the consent of any other person,") and on his (A.'s) death, C. enters, and the possession and receipt of rents are, according to the defective conveyance, for the period of twenty years;—under these circumstances, the provision in question would have the effect of conferring a perfect title. But it must be observed, that if B. had levied a *fine* instead of suffering a recovery, the act would not have assisted the title, even though he had been seised of an estate tail in possession; for the act supposes that the assurance was such an assurance as, if duly made, would have been adequate to bar the remainders. An intention to amend the clause, so as to embrace the case of a defective assurance otherwise than by recovery, is understood to have been intimated. It is observable that the words "without the *consent*," seem to anticipate the alteration which was soon afterwards effected in the law by the Fine and Recovery Act; for the word *concurrence* would have been more appropriate in regard to recoveries. If, therefore, we refer the case last proposed to a period subsequent to that alteration, substituting for a recovery an assurance

—illustrated by examples,

by deed inrolled, (i. e. without the *consent* of the tenant for life as *protector*,) the result would be the same—a good title as against the remainder-man.

—questionable in certain cases suggested.

Other cases may be suggested in which the question of the applicability of the above clause is less easily solved. Thus, A., tenant in tail, with remainder over, conveys by lease and release to B., a purchaser, and his heirs; afterwards, A., without the concurrence of B., conveys to a tenant to the *præcipe*, and suffers a recovery, declaring the use in favour of B. and his heirs; then A. dies without issue; B. enters on the execution of the original conveyance, and continues to enjoy for twenty years after the death of A. Here, of course, the recovery is the defective assurance sought to be aided by the statute. Now, the commencement of the time at which a recovery could have been suffered with effect, without the concurrence of B., would be the determination of his estate under the original conveyance, which could not determine until the death of A.; but as the statute contemplates the continued existence, at that period, of the tenant in tail making the defective assurance, or of his issue, it is apprehended that the case does not fall within the provision. Suppose, on the other hand, that A. had left issue, the question would then be, whether a recovery suffered by the issue of A. after his death, without the consent (or, concurrence) of B., would have been effectual;—it is conceived that the question may be answered in the affirmative, inasmuch as the first conveyance passed only such an estate as A. might lawfully grant, and that the case would consequently fall within the provision. But if the first conveyance had been by feoffment, working a discontinuance, then it should seem that, as the seisin of the issue would have

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been taken away, and as a recovery suffered by the issue, without the concurrence of B., would therefore have been invalid, the case would not fall within the provision. When the provision dispenses (as it does impliedly (*a*)) with the consent (or, concurrence) of the person in possession under the defective assurance, the dispensation must be considered as limited to his estate under *that* assurance; whereas B. would, if the *previous* conveyance had divested or discontinued the estate tail, continue to be *in* of the estate created by *that* conveyance, and in respect of such estate have been a necessary party to make a tenant to the præcipe, unless the estate of the issue had been restored by entry or action. And even with respect to the case first put, of an innocent conveyance by lease and release, it must be observed, that such a conveyance has been treated as passing a fee, voidable only as against the issue by entry. (*b*) This well-meant clause seems to demand revision.

Probable effect of the act in regard to the practice of requiring a title for sixty years.

But the inquiry most interesting to the conveyancer, arising out of the act under consideration, is whether it will exert any, and if any, what degree of influence, upon the established practice in regard to the deduction of titles to real property. The discussion upon which we are about to enter, *anticipates* the operation of the act; for the abolition of real actions is not *immediate*. (*c*) By some it is taken for granted that a sixty years title will no longer be required, but that forty years, which is the most extended period allowed by the act, (*d*) will henceforth be the limit; while others maintain that the practice will remain unaltered. In order to solve the question, it is necessary to consider how

(*a*) *Vide suprà*, 149 (*b*) 1 Prest. Est. 436.
(*c*) Ss. 36, 37, and Table of Periods, *infrà*, 169. (*d*) S. 17.

far the practice is founded upon the old statutory limitation, and how far that foundation is removed by the new enactments. Those who assume that after the lapse of sixty years, which was the period of limitation to a writ of right, the extreme remedy of the old law, all danger of eviction was at an end, and that *therefore* the period of sixty years was adopted for the deduction of titles, are clearly in error, since, in the case of a sale or mortgage of land, limited for life or in tail, the remainder-man or reversioner might certainly have recovered within twenty years after his right accrued by the determination, at any period however distant from the transaction, (*a*) of the estate for life or in tail, and notwithstanding any length of enjoyment as against the owner or successive owners of that estate, which period of twenty years was liable to be extended, perhaps indefinitely, by disabilities on the part of the claimants. If the limitation to a writ of right originally suggested, as it very probably did, the period of sixty years, yet it did not furnish, or did not alone furnish, the ground and reason of the practice, which requires the title to real property to be deduced for that period at least. There can be no mathematical certainty of a good title, but there may be a strong moral probability, and it was thought that a scrutiny prosecuted through the *res gestæ* of the last sixty years afforded that probability. The more extended the period of research the greater the assurance of safety, but convenience required, and practice has established, a conventional limit. The requisition of a sixty years' title was not confined to cases in which the remedy by writ of right was available. By the new act the writ of right is taken away; twenty years'

(*a*) See 12 Ves. 248.

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possession adverse to a tenant in tail operates against those in remainder and reversion, (*a*) whose estates are in effect constituted for this purpose an integral part of the inheritance of the tenant in tail; and the only action left to the remainder-man or reversioner is an ejectment (for writs of *formedon* are abolished,) and the period limited for bringing an ejectment is twenty years, (*b*) which cannot be extended by disabilities or otherwise beyond forty years. (*c*) It is clear, therefore, that possession adversely to a tenancy in tail, if held for twenty years *may*, and if prolonged to forty years *must* constitute a perfect title as against the issue, remainder-men and reversioner. But it is obvious that no such limitation could be applied to a remainder or reversion expectant on a tenancy for *life*, and therefore possession held adversely to a tenancy for life, through the whole period of a life protracted by extreme longevity, would afford no security to a purchaser against eviction by a claimant entitled in remainder or reversion. The vendor's title may commence forty years' ago with a simple conveyance in fee from A. to B.; but A., or his predecessors in title, may have dispossessed C., a tenant for life, or A. himself may be only tenant for life or tenant *pour autre vie*:—in either case, if the life be still in existence, or if it dropped within twenty years, or if, having dropped twenty years ago, or upwards, the right of the remainder-man or reversioner has been kept alive by disability, (*d*) the purchaser, accepting such a title, will be in imminent danger of eviction. It may be urged that the same reasoning would equally prove the insufficiency of a title for sixty years; (which period is less

(*a*) Ss. 21, 22.
(*b*) S. 2.
(*c*) S. 17.
(*d*) S. 16.

than ought to be allowed for the duration of human life, especially when it is considered that a life estate may be limited to a person unborn,) but this would be an argument for extending rather than abridging the investigation; it would show that while even sixty years affords but a precarious guarantee, forty years must be absolutely hazardous. Every year subtracted from the period fixed by practice, and sanctioned by the courts, diminishes the security. As the law stood (and, indeed, having regard to the deferred operation of the act, as the law actually stands), a title regularly deduced for centuries might prove bad; there being not only the danger of eviction by a remainder-man or reversioner after a tenancy for life, but the more remote danger of eviction by a remainder-man or reversioner after an estate-tail. By the new law the latter danger will be removed or considerably diminished (though it must be borne in mind that the twenty-third section, relative to defective assurances by tenants in tail (*a*) is very limited, and that possession under such an assurance will not be adverse, within the twenty-first and twenty-second sections, till the death of the tenant in tail), but the former danger is not removed or considerably diminished. The removal or diminution of one only of those hazards, and *that* the least imminent, cannot, it is conceived, justify the sudden deduction of twenty years from the ordinary term. Other arguments might be adduced, and other cases be put, but enough has been said to caution the practitioner against assuming that the act operates, as of course, to render a forty years' (*b*) title strictly market-

(*a*) *Vide suprà*, 149.

(*b*) The writer is happy to find that the view taken in the text coincides with the opinion of several eminent conveyancers, and

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able. To those who contend for *twenty* years it would probably be vain to address any thing in the shape of argument. It should also be borne in mind that a vendor, unless protected by express stipulation, is compellable to produce, on oath, all the documentary evidence of title in his possession or power, however remote the period to which that evidence may refer. But though the act should not operate to establish a new rule in regard to the deduction of titles generally (a result which the framers of the measure never contemplated,(*a*) and which, indeed, it were vain to expect from the legislature,) yet it will certainly cure the infirmities of many titles, and may, by inspiring confidence in the security of possessions, induce the professional adviser to abate somewhat of his jealousy and rigour.

Opinions of text-writers upon the point.

Though till the provisions of the statute in regard to real actions shall be in full force, this important question (which will then probably receive a judicial determination,) may be considered as in some degree speculative, yet the near approach of that period must render the practitioner anxious to ascertain and compare the opinions of those who from their learning and experience are entitled to be heard upon the point. No apology is necessary, therefore, for introducing the following passages from works of established reputation:—"A purchaser, (observes a writer whose authority upon matters of title must always have peculiar force,) be-

particularly with that of a distinguished member of the Real Property Commission, who has kindly communicated an opinion given in practice on this important subject, with permission to insert it in this work, of which it will be seen (*infrà*, p. 178) that the writer has availed himself.

(*a*) *Vide infrà*, 160.

fore the late act of 3 & 4 Will. 4, c. 27, had a right to require a title commencing at least sixty years previously to the time of his purchase; because the old statute of limitations (*a*) could not in a shorter period confer a title. In Paine *v.* Meller, (*b*) Lord Eldon was of opinion, that an abstract not going further back than forty-three years, was a serious objection to the title. Even sixty years were not sometimes sufficient. For instance, if it might reasonably be presumed from the contents of the abstract, that estates-tail were subsisting, the purchaser might demand the production of the prior title. The statutes of limitation could not in such case be relied on; remainder-men, having had distinct and successive rights, upon which at least the statute of James could only begin to operate as they fell into possession. It might have been thought in the common case of a man claiming by descent, a reversion expectant upon particular estates created by his ancestor's will, that a writ of right would not lie after sixty years from his ancestor's death, although the particular estates had but recently determined. But however this might be, the objection still remained, for an ejectment might have been brought at any time within twenty years after the estate fell into possession. But the law is altogether altered by the 3 & 4 Will. 4, c. 27, which limits the general time to recover to twenty years, with a saving of ten years for persons under disability, but not to exceed in any case forty years, although the ten years are not expired. The act allows no further time for successive disabilities, and makes the bar of the tenant, in fact,

(*a*) 32 Hen. 8, c. 2; 21 Jac. 1, c. 16; and see Barnwell *v.* Harris, 1 Taunt. 430.

(*b*) 6 Ves. jun. 349. See Robinson *v.* Elliott, 1 Russ. 599.

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extend to all whom he might have barred. This will ultimately tend to shorten abstracts considerably, and in the result forty years will probably be considered the proper period instead of sixty for an abstract to extend over, *but still cases must frequently arise where it will be necessary to call for an earlier title.* As fines are abolished, a short bar, as formerly, cannot now be made." (*a*)

Another writer, after noticing the difference of opinion upon this point, and quoting the opinion expressed in the preceding pages of this chapter, proceeds thus:—" With this opinion the practice of the profession seems to accord; and courts of equity, or at least their officers, the masters, continue to act upon the old rule, without any relaxation. One feels, however, some hesitation in acceding to the notion that the rule in question was established in reference exclusively to the duration of human life, without regard to the limitation of real actions; seeing the exact correspondence between the periods of title and limitation, and that the rule, if framed with a view to the claim of a remainder-man, falls short of its aim, as even an estate for life (to say nothing of an estate-tail) may outlast the period of sixty years. The probability is, that when it became necessary to establish the minimum extent to which abstracts of title under all circumstances should reach, sixty years were fixed on as being the period when an adverse possession would confer an unimpeachable title, *with little or no regard to the case of a tenancy for life or a tenancy in tail, either of which would evidently have suggested the necessity of a more extended range of investigation.* Indeed, as an estate-tail is of indefinite duration,

(*a*) 1 Sugd. Vend. 9th ed. 329.

no length of time could reach such a case; and therefore the recent statute has wisely included tenants in tail and ulterior remainder-men in the same bar. (*a*) But though a consideration of the possible existence of remainders may not have had so large a share as has been ascribed to it in the establishment of the present doctrine respecting titles, it may constitute a sufficient ground for adhering to it; for, if that doctrine has hitherto left a purchaser in too precarious a condition, *now is the time to augment his security by refusing to contract the period of title, in analogy to the abridged remedy.* Had the present rule afforded ample protection under the old Statute of Limitations, it is obvious that the approaching alteration of the law would have warranted and required its modification; but the truth seems to be, that a purchaser's scope of inquiry ought never to have been limited to the mere period when an adverse possession could ripen into a rightful title, but should have extended *additionally* over such a period as would comprehend a life in being, or rather the period which the law allows for the suspension of the vesting of estates, because, *until the termination of such period, the possession may not have become adverse.* It seems, then, that the rule against perpetuities forms one of the strong holds of a purchaser's security; and as, under that rule, it may happen that a limited and terminable ownership may subsist for more than sixty years (namely, for a life and twenty-one years,) it is impossible, without hazard of doing injustice, to pronounce a title of shorter duration than sixty years to be marketable. Still, however, it cannot be denied, that with such a title a purchaser will now be in a better situation than formerly, and hence,

(*a*) *Vide* stat. 3 & 4 Will. 4, c. 27, s. 22, 23.

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probably, there will be some abatement of that strictness of requisition in regard to evidence of title, which has prevailed of late years, and has driven vendors to the countervailing expedient of introducing stipulations restrictive of a purchaser's demands;—and it must be borne in mind that a purchaser not so restricted, may always compel the disclosure of every document of title, however ancient, in the vendor's possession." (*a*)

The requisition of a sixty years' title justified by the authority of the Real Property Commissioners.

The best answer, perhaps, which can be given to those who contend for a reduction of the period to forty years, is to quote the authority of the Real Property Commissioners, under whose sanction the act was prepared. The commissioners, in their first report, after observing upon the length of abstracts, and that some diminution would result from shortening the period of limitation, add, "although, to guard against the fabrication of fee-simple titles by persons in possession under particular estates, it will still be requisite to investigate titles *for a greater number of years than the period of limitation which may be prescribed.*" The "number of years" cannot be allowed to depend on the circumstances of each case; a general rule must be adopted; and the practitioner has no approved standard but the old rule until a new rule shall be propounded by competent authority.

PRESCRIPTION and TITHES.

The acts for shortening the time of prescription in certain cases, (*b*) and the time required in claims of *modus decimandi*, or exemption from or discharge of tithes, (*c*) are also important, as branches of the new law of limitation. (*d*)

(*a*) 9 Jarm. Conv. 417, 418. (*b*) 2 & 3 Will. 4, c. 71.

(*c*) 2 & 3 Will. 4, c. 100, amended by 4 & 5 Will. 4, c. 83.

(*d*) The practitioner should be apprised that some provisions relating to the stamping of deeds have found their way into an act of

Commencement of acts of 3 & 4 Will. 4.

The preceding remarks on the statutes of 3 & 4 Will. 4, should be read with particular attention to the periods denoted by the accompanying Table, (*a*) of which periods the earliest is the 1st January, 1834, when, for most practical purposes, the Fine and Recovery Act, and the Dower Act, came into force. Henceforth, therefore, the student, by cultivating both the book-learning on titles of abrogated law—on fines, recoveries, warranty, discontinuance—and the living principles of modern legislation, must qualify himself as well to solve questions demanding the application of the old doctrines, as to co-operate in the formation of a new system of law and practice.

Two statutes have passed more recently, which, though less generally interesting and important, yet deserve to be noticed.

Escheat. 4 & 5 W. 4, c. 23. (*Royal Assent, 27th June*, 1834.)

By one of these statutes, intituled "AN ACT FOR THE AMENDMENT OF THE LAW RELATIVE TO THE ESCHEAT OR FORFEITURE OF REAL AND PERSONAL PROPERTY HOLDEN IN TRUST," the law of escheat and forfeiture, so far as the owners of equitable interests were

last session, 3 & 4 Will. 4, c. 97, s. 17, intituled, "An Act to prevent the selling and uttering of *Forged Stamps*, and to exempt from stamp duty *Artificial Mineral Waters* in Great Britain, and to allow a drawback on the exportation of *Gold and Silver Plate* manufactured in Ireland." By this act (s. 16, 17,) the commissioners of stamps are empowered to alter the dies, giving not less than one calendar month's notice in the gazette: deeds stamped with the old dies, and not executed by any of the parties before the day notified, are to be treated as unstamped, and will of course be inadmissible in evidence; subject to a special provision enabling the commissioners to relieve in the case of deeds first executed out of the united kingdom.

(*a*) *Infrà*, 169. This Table, and the Tables of Descent, have been contributed, at the writer's request, by his friend Mr. Ingram, and will be found very valuable accompaniments to the Statutes.

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Estates held upon trust or by way of mortgage exempted from escheat and forfeiture.

involved in its consequences, is altered. We have seen that under the old law, if a trustee of the legal fee died without an heir, the land escheated to the lord, who, being *in* by title paramount, was not bound by the trust. So where a mortgagee of the legal fee died without an heir, the mortgagor lost his equity of redemption. The attainder of the trustee or mortgagee was attended with a similar result. But the act provides that where any person seised upon any trust or by way of mortgage dies without an heir, the Court of Chancery may appoint a person to convey, as if such person had left an unknown heir (*a*) according to the infant trustee act of 11 Geo. 4, and 1 Will. 4, (*b*) and on attainder or conviction of any such person the land shall not escheat or be forfeited, but remain in him or survive to his co-trustee, or devolve upon his representatives as if no such attainder or conviction had taken place. (*c*)

Retrospective operation of the act.

The act has also a retrospective effect, providing that where, by reason of the death without an heir, or of the attainder or conviction of a trustee before the passing of the act, escheat or forfeiture shall have occurred, the Court of Chancery may treat the case as falling within the provisions of the above infant trustee acts in regard to persons out of the jurisdiction of or not amenable to the process of the Court. (*d*) But this act does not touch the converse case of a *cestui que trust* dying without an heir; (*e*) as where the legal fee is vested in A., in trust for B. and his heirs, and B. dies without an heir. (*f*)

(*a*) S. 2. (*b*) C. 60. (*c*) S. 3. (*d*) S. 6.

(*e*) Burgess v. Wheate, 1 Black. Rep. 123.

(*f*) To deprive the lord of a valuable fruit of tenure without compensation, and charge his right of reverter with a trust, to the creation of which trust he was not either directly or indirectly a party, many will probably deem not just. The lord's right of reverter arises from

APPORTIONMENT. 4 & 5 W. 4, c. 22. (*Royal Assent*, 16*th June*, 1834.)

The other of these statutes, intituled "AN ACT TO AMEND AN ACT OF 11 GEO. 2, (*a*) RESPECTING THE APPORTIONMENT OF RENTS, ANNUITIES AND OTHER PERIODICAL PAYMENTS," after declaring that the provisions of the act of 11 Geo. 2, shall be considered as extending to rents reserved on leases determining on the death of the person making them, (whether strictly tenant for life or not,) or with the life or lives for which such person was entitled, (*b*) provides that from the passing of the act rents service reserved on leases granted after the act by tenants in fee, or for any life interest, or under powers, and rents-charge, and other rents, annuities, dividends, and other payments in Great Britain and Ireland, accruing at fixed periods under instruments executed or (being a will or testamentary instrument) coming into operation after the act, shall be apportioned, so that on the determination, by death or otherwise, of the interest of any person, such person, or the executors, administrators or assigns of such person, shall be entitled to a proportion of the rent or other payment from its commencement or the last day of payment, including the day

Extension of 11 Geo. 2, c. 19.

Rents, annuities, &c. to be apportioned.

the terms of the original grant or subinfeudation, as much as the landlord's reversion on a common tenancy for years arises from the terms of the demise. Now, were it proposed to impress, by extension, on a landlord's interest, a trust impressed by a tenant on his (the tenant's) own interest, most persons would perceive the injustice of the proposal; but in what would this differ in principle from the statute in the text? If the lord can with propriety be deprived of his interest in an escheat, he can equally so of his interest in the rents and services. To compensate the lord so nearly as might be by giving him the escheat of the *equitable* interest on failure of heirs of the *cestui que trust*, though objectionable on, among other grounds, that of its creating another anomaly in the law, would not be objectionable on any moral ground.

(*a*) C. 19. (*b*) S. 1.

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of the determination of such interest, after making all just allowances; (*a*) but with respect to rents reserved on leases, the whole rent is payable in the first instance to the person who would have been entitled if the act had not passed, to whom, therefore, the person claiming an apportionment must resort. (*b*) It would have been more beneficial to the person or his representatives, on whom the act purports to confer an apportioned part, if he had been invested with a remedy against the tenant or trustee, or other person primarily liable, as the case might be; the personal remedy given is as easy of evasion as other personal remedies, and is subject to difficulties peculiar in a great degree to itself.

Examples illustrative of the change effected by the act.

As the law previously stood, if an owner in fee granted a lease for twenty-one years, at a rent payable half-yearly, and then settled the reversion on A. for life, remainder to B.; or if an owner in fee settled the land in possession on A. for life, remainder to B. and his heirs, with power enabling A. to grant leases for twenty-one years, under which power A. leased for twenty-one years at a rent payable half-yearly;—in either case, on the death of A., during a current half-year, the whole half-year's rent accrued to B. So, if the limitations were to A. for the life of C., remainder to B; on the death of C. during a current half-year, the whole half-year's rent went to B. But henceforth a fractional part of the rent or other payment, proportionate to the period which shall have elapsed of the current half-year, will belong to A. or his representatives; though the whole half-year's rent will be primarily payable to B., from whom A. or his representatives must recover his proportion as money had and received to his use. The old law was the same

(*a*) S. 2. (*b*) *Ib.*

with respect to annuities and dividends of stock, but these are now apportionable.

Whether annuities, &c. ceasing on the death of the person interested are within the act.

This statute, however, is not expressed with accuracy and precision, but as it is especially of a remedial and equitable character, it will doubtless be applied in construction to all cases within the mischief, and not appearing to be intentionally excluded. The most important question which arises upon it is, whether the second section extends to the case of an annuity or other periodical payment which determines on the death of the person interested. Thus, A. grants an annuity to B., for the life of B., payable half-yearly at Midsummer and Christmas; B. dies on the 23d of December;—are the representatives of B. entitled to recover from A. a proportionate part of the annuity for the time elapsed from the preceding Midsummer? The question may be solved, it is conceived, by attending to the scheme of the act, and to the language of the second section. The act proposes to itself two objects; first, to give an extended interpretation to the act of 11 Geo. 2, which awards a recompence for the space elapsed from the last rent-day until the death of the tenant for life to his representatives, as against his lessee, who before that statute passed enjoyed the land absolutely rent-free for the interval, so that the statute not merely modified the right to receive, but created the liability to pay; secondly, to *apportion* "rents, annuities and other payments not apportionable, unless express provision be made for the purpose." These objects are sought to be severally accomplished by the first and second sections. Now, it is clear that in the case proposed, A. would not be liable, by force of the grant, to make any payment to any person on account of the annuity for the time elapsed since Midsummer; and that

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such cases, therefore, are analogous to those of leases by life-hold tenants, which form the subject of the first section; but the legislature has *there* thought fit to make a *special* application of the principle to rent reserved upon demises by life-hold tenants, and it would be a strong measure to extend the relief to payments of a different description. The second section provides for the apportionment of periodical payments. But the case which we are now considering is not a case of *apportionment*, in any correct acceptation of that term, which supposes an existing fund to be doled out among several claimants according to their respective rights; whereas in the case proposed, the annuity ceased on the death of B., and nothing remained to be apportioned. Besides, the wording of the second section, when it speaks of the apportionment of the annuity, &c. on the death of "any person interested in such annuity," &c. or, on the determination by any other means whatsoever "of the interest of any such person," and provides for the recovery of the apportioned part "when the entire portion *shall* become payable, and not before," appears, in terms, to exclude the case in question. The provision seems to contemplate throughout a *determinable* interest in a *continuing* subject, and, even if it could be collected that cases of the class to which that under discussion belongs were within the purview of the legislature, it would still require considerable freedom of interpretation to bring them within the letter. It has been observed, (*a*) that to give the annuitant a proportion would seem to be an unauthorised interference with the contract of the parties, for why should one party be bound to pay, and the other entitled to receive more than such contract

(*a*) 9 Jarm. Conv. 578, n.

specifies? But it must be recollected that in the instance of the lessee of a life-hold tenant the legislature *has* so interfered, and it is not clear, perhaps, that on examination there would be found any substantial difference in principle between the cases. However, the very frame and language of the act seem to forbid our entering upon considerations designed to include them both, as being equally within the reason of the law.

Conclusion.

We have thus taken a rapid and general view of a larger mass of real property law than the legislature ever before produced in so short a period. To have travelled through the acts in detail, to have anticipated questions, and indulged in speculations on their construction and effect, would not have been consistent with the limits or the design of this work. Whatever defects may be found in these the first serious attempts to revise our civil jurisprudence, still the result, upon the whole, may be deemed creditable to the character of the profession as a learned and candid body, and of the people as an enlightened and progressive community. As to fines and recoveries, the abolition of those mystic rites and solemnities, which not even the officiating priesthood could ever comprehend, (*a*) was long since proposed by grave and cautious men, and its practicability had been evinced by the experience of some of our colonies for more than a century. The rules of inheritance have been less necessarily, and the law of dower less fortunately touched; but the statutes for shortening the period of limitation, and for the relief of simple-contract creditors, were demanded by justice and policy—by all who desire to live quiet and to die honest. On

(*a*) 1 Wils. 73.

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the practical success of the new acts will depend, in some degree, the progress of legal reform, which, unless discouraged by eminent failure at the outset, is not likely to relax its efforts until it has removed the moss from every stone of the ancient edifice of our laws, and accommodated to modern ideas of utility and order the unwieldy forms and obsolete style of the feudal architect. (*a*) But in seeking to correct its faults, let us shun the vice of excessive legislation, recollecting that acts of parliament, however skilfully framed, (and most of those on which we have been commenting proceeded from a commission constituted of very able lawyers,) do but contribute to furnish the rude substratum on which the judicature slowly rears a system of rules, and that while the foundation is continually shifting, the superstructure can acquire neither solidity nor symmetry.

(*a*) It is probable that all or most of the inconveniences resulting from the rules of tenure will be remedied, particularly those glanced at towards the conclusion of the fourth Chapter. The extinction of dry legal estates, unaccompanied with either interest or duty, is a desideratum, but the peculiar constitution of our judicature, and the importance of maintaining a broad line of separation between the provinces of law and equity, render the attempt difficult and hazardous. By ameliorations in the doctrines of tenure the frequency of such estates will be diminished. Some Questions prepared by the writer, with the view of inviting discussion on this subject, when it was under the consideration of the Real Property Commissioners, will be found in a subsequent part of this volume.

A Table

showing all the expressly fixed Periods for the efficient Commencement of Clauses in the Acts of the 3 & 4 Will. 4, to amend the Law of Real Property.(a)

3 & 4 Will. 4, c. 27. An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [*Royal Assent, 24th July,* 1833.]

DECEMBER 31, 1833.

1. *After* THIS DATE, no entry, distress, or action at *law*, for land or rent, except within twenty years after the time when, as enacted, the right thereto accrued, s. 2; which period, in cases of disability only, is capable of enlargement, s. 16; but not beyond forty years, s. 17.

2. Suits in *equity* for land or rent subjected to same limitation, ss. 24, 28.

3. *After* THIS DATE, no entry, distress, action, or suit, by spiritual or eleemosynary corporation sole for land or rent, unless within two successive incumbencies and an additional term of six years, with, where the aggregate of such periods amounts not to sixty years, an allowance of a further term equal to the difference between such aggregate and sixty years, s. 29.

4. *After* THIS DATE, no quare impedit, or other action or suit for advowson, after three adverse incumbencies; with

(a) For the meaning of those *technical* terms in this table, to which particular significations are affixed by the Acts, the reader must consult the respective Acts.

an allowance, if such incumbencies do not amount to sixty years, of a further period equal to the difference between the aggregate of such incumbencies and sixty years, s. 30, 31; but in no case after 100 years from presentation, &c. adversely either to the claimant or those under whom he claims, or else to a preceding interest derived under the same title, unless in case of a mediate presentation, &c. in respect of an estate under the same title, s. 33.

5. *After* THIS DATE, no descent cast, discontinuance, or warranty to toll or defeat any right of entry or of action, s. 39.

6. *After* THIS DATE, no action or suit for any money secured on land by mortgage, judgment, lien, or otherwise, or for any legacy, except within twenty years after right to receive same by a person capable of giving a discharge, or after last payment of part principal or interest, or last acknowledgment in writing by a person liable, s. 40.

7. *After* THIS DATE, no arrears or damages in respect of dower, for more than six years before action or suit, s. 41.

8. *After* THIS DATE, no arrears of rent; or of interest for any money charged on any land or rent, or for any legacy; nor any damages in respect of such arrears recoverable, except within six years after accruer or acknowledgment in writing, save arrears of interest accrued while prior incumbrancer is in possession up to within one year next before the action or suit, s. 42.

9. Like limitation of suits in *ecclesiastical* courts for tithes, legacy, or property recoverable *also* by action or suit at law or in equity, s. 43.

JULY 24, 1833.—(*Passing of the Act.*)

10. *From* THIS DATE, five years allowed for entry, distress or action, if the possession, or receipt of profits, or receipt of rent, at passing of the act, was not adverse to the right of the claimant, notwithstanding lapse of twenty years since

the right of the claimant or of the person under whom he claims accrued, s. 15.

DECEMBER 31, 1834.

11. *After* THIS DATE (subject to the exception in No. 12,) no action, real or mixed, and no plaint in nature thereof (except writ of right of dower, writ of dower unde nihil habet, quare impedit, or ejectment, and except plaint for freebench or dower,) s. 36.

JUNE 1, 1835.

12. *Before* THIS DATE, every person having *on* DECEMBER 31, 1834, right of *action*, but not of *entry*, may, notwithstanding (only) the act, bring any such writ or action as by s. 36 is otherwise abolished, s. 37.

JUNE 1, 1835.

13. *After* THIS DATE, every person who, *on* JUNE 1, 1835, could maintain such writ or action as by s. 36 is otherwise abolished, but whose entry shall have been taken away by descent cast, discontinuance, or warranty, may maintain such writ or action within the like period as the act would have allowed his entry if not so taken away, s. 38.

3 & 4 Will. 4, c. 74. An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance. [*Royal Assent, 28th August*, 1833.]

DECEMBER 31, 1833.

14. *After* THIS DATE, no fine or recovery of land of any tenure, unless dedimus or other writ for this purpose sued out *on or before* THIS DATE, s. 2.

15. *After* THIS DATE, persons who by any instrument executed *before* 1st JANUARY, 1834, have covenanted or agreed

to levy, suffer, or procure a fine or recovery of land of any tenure, are enabled to adopt an alternative substitute mode, s. 3.

16. *After* THIS DATE, no writ of disceit to reverse fine or common recovery, s. 6.

17. *After* THIS DATE, no tenant in tail shall bar issue or ulterior claimants by warranty, s. 14.

18. *After* THIS DATE, actual tenant in tail in possession, remainder, or contingency, may alien against all persons entitled under or on the determination or in defeasance of the estate-tail, s. 15; subject to exceptions, ss. 16 and 18; and to divers regulations touching effect, consent, form, &c.

19. *After* THIS DATE, every person who would be actual tenant in tail but for the conversion, before or after passing of act, of his estate tail into base fee, empowered to alien absolutely, s. 19.

20. *After* THIS DATE, so much of Bankrupt Act, 6 Geo. 4, c. 16, s. 65, as authorises alienation of lands held by bankrupt in tail, repealed, except in respect of commission or fiat *on or before* 31st DECEMBER, 1833, s. 55 (*see* s. 61); and the commissioner under fiat, issued subsequently to *that* day, substituted for bankrupt tenant in tail, as to power of alienation, ss. 56, 57, 58, 62, 65, 69, 71, 72.

21. *After* THIS DATE, alienations of a certain quality by bankrupt tenant in tail, void against disposition by commissioner, under the act, s. 63.

22. Interim (mesne) rents until alienation by commissioner under a fiat issued *after* THIS DATE, to be received by assignees, s. 67.

23. The clauses as to acts to be done under fiats in bankruptcy issued *after* THIS DATE, extended to lands in Ireland, ss. 68, 69, 72.

24. *After* THIS DATE, act 7 Geo. 4, c. 45, as to estates tail in lands directed to be purchased, repealed, except as to proceedings thereunder commenced before 1st Jan. 1834, s. 70; other regulations substituted, ss. 71, 72, 73, 74.

25. *After* THIS DATE, married women (not being tenants in tail within the previous clauses) empowered to alien, release, and extinguish (*a*) estates and powers in or over lands, including lands directed to be purchased, ss. 77, 79, 80.

26. In the case of an estate under a settlement having been aliened *on or before* THIS DATE, the person who but for the act could have made tenant to the pæcipe shall be protector, s. 29.

27. In the case of a person, who would otherwise under the act be protector, having aliened, wholly or partially, *on or before* THIS DATE, his remainder or reversion in fee, the person, who but for the act could have made tenant to the præcipe shall be protector, s. 30.

JANUARY 1, 1834.

28. *From* THIS DATE, lands in ancient demesne converted into frank fee by fine or recovery not reversed *before* 1st JANUARY, 1834, the lord not being barred of his writ of disceit by any law in force on first day of session in which act passed, are, if lord's rights acknowledged within twenty years *before* 1st JANUARY, 1834, constituted from the latter mentioned day, part of the manor, s. 6.

AUGUST 28, 1833. *(Passing of the Act.)*

29. *From* THIS DATE, fines and recoveries, *(past and future,)* in superior courts, of lands in ancient demesne shall, on pending and future writs of disceit, be vacated as to the lord only, and be binding on the conusors and vouchees, s. 4.

30. *From* THIS DATE, fines and recoveries, *(past and future,)* in ancient demesne, valid notwithstanding conversion into frank fee by fine or recovery in superior court; *past* fines and recoveries of lands of any tenure in courts either not having sufficient local jurisdiction, or else being unlawful or held without sufficient authority, not to be deemed invalid on any such account, s. 5.

(*a*) See s. 1 of the Act.

31. *From* THIS DATE, errors in proceedings in (*past and future*) fines as to names and lands, and errors and defects in (*past and future*) recoveries in respect of the proceedings, or of the deed making tenant to the præcipe, cured, s. 8, 10, 11, subject to exceptions, s. 12, referring to the period of passing the act, s. 12.

32. *From* THIS DATE, a female tenant in tail, ex provisione viri, within statute 11 Hen. 7, c. 20, under a settlement made *before* the principal act, to remain subject to that statute, ss. 16, 17.

33. *From* THIS DATE, any person who under settlement made *before* THIS DATE, could, but for the act, make tenant to the præcipe, shall, though bare trustee, be protector, s. 31.

34. *From* THIS DATE, every voidable estate created, *before or after* THIS DATE, by tenant in tail in favour of a purchaser for valuable consideration, shall (except as against purchaser for valuable consideration without express notice) be impliedly confirmed by any assurance under the act, (except lease not requiring inrolment,) s. 38.

35. *From* THIS DATE, where, at or after THIS DATE, base fee shall be vested in the same person, with the immediate remainder or reversion in fee, the former shall become enlarged to such an estate as the tenant in tail could have created, s. 39.

36. *From* THIS DATE, *past* surrenders by husband and wife of her *equitable* interests in copyholds rendered valid, s. 90.

3 & 4 Will. 4, c. 104. An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple (*and*) Contract Debts. [*Royal Assent, 29th August*, 1833.]

AUGUST 29, 1833. (*Passing of the Act.*)

37. In every case of a person dying seised *after* THIS DATE

of any estate or interest in freehold, customaryhold or copyhold estates, and not charging the same, by will, with his debts, such estate or interest made assets for his debts, as well simple contract as specialty, to be administered as the act directs.

3 & 4 Will. 4, c. 105. An Act for the Amendment of the Law relating to Dower. [*Royal Assent, 29th August*, 1833.]

JANUARY 1, 1834.

38. Not to extend to the dower of any widow married *on or before* THIS DATE, nor give to any will, deed, contract, engagement, or charge executed, entered into or created *before* THIS DATE, the effect of defeating or prejudicing any right of dower, s. 14.

3 & 4 Will. 4, c. 106. An Act for the Amendment of the Law of Inheritance. [*Royal Assent, 29th August*, 1833.]

DECEMBER 31, 1833.

39. In every case of a testator dying *after* THIS DATE and devising land to his heir, or to a person being his heir, such heir shall take by *devise;* and land limited in any assurance executed *after* this date to the person, or to the heirs of the person conveying, shall be taken by such person as a *purchaser*, s. 3.

40. If a person acquire land as purchaser under a limitation to the heirs, or to the heirs of the body of his ancestor, contained in an assurance executed *after* THIS DATE, or under a limitation similar or of like effect contained in the will of a testator dying *after* THIS DATE, such land shall descend, and the descent be traced as if the ancestor were purchaser, s. 4.

41. Descent may be traced through a person attainted, unless the land escheated by such attainder *before* THIS DATE, s. 10. (*Vide suprà*, 161.)

42. Act not to extend to descents on death occurring *before* THIS DATE, s. 11.

43. Under a limitation to the heir or heirs in any assurance executed *before* THIS DATE, or in the will of any person dying *before* THIS DATE, which would confer an estate by purchase, the person or persons who would have answered the description of heir or heirs under the pre-existing law shall take, s. 12.

An Alphabetical Index*

to facilitate the use of the preceding Table.

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* In this Index titles too general, (e. g. "Tenant in tail" and the like,) have been omitted as useless. The reader must not consider this as an Index to the Acts. The numbers in the Index refer to the sections of the Table.

MR. BRODIE'S *Opinion on the Effect of the new Statute of Limitations, (3 & 4 Will. 4, c. 27,) with reference, chiefly, to the Rule requiring a Sixty Years' title.*

A good title by means of an adverse possession of twenty years cannot be acquired so long as real actions can be brought. By the 37th section, these actions may be brought at any time before the 1st of June, 1835.

Corporations, other than spiritual or eleemosynary, barred by twenty years' adverse possession;

As, by the 1st section, the word *person* is made to extend to a body politic, corporate, or collegiate, corporations of all descriptions, (except such as are spiritual or eleemosynary, for which a special provision is made by the 29th section, and except the crown,) will, by the 2d section, when it comes into full operation, be barred by twenty years' adverse possession.

—but not the Crown.

The crown must have been specially named to have been barred.

Twenty years' adverse possession a bar to estates for life, in fee, and in tail, and estates ulterior to estates tail.

When there are no disabilities, then under the 2d, 21st and 22d sections, an adverse possession of twenty years, and when there are disabilities, then an adverse possession for the periods fixed in the 16th, 17th and 18th sections, will bar either an estate for life, or an estate in fee, or an estate tail, and all estates to take effect after or in defeasance of an estate tail; and by the 23d section, a possession for twenty years by a person entitled under an assurance by a tenant in tail, which shall not bar the estates to take effect after or in defeasance of the estate tail, will have the effect of barring the same.(*a*)

But possession adverse to a life estate does not run against those in remainder or reversion,

But possession adverse to a tenant for life, will not run on against a remainder-man or reversioner, so that although a tenant for life may be barred by an adverse possession of twenty years, it would, except in the case specified in the

(*a*) *Sed vide suprà*, 149.

20th section, require another period of adverse possession, commencing from the death of the tenant for life, to bar a remainder-man or reversioner.

—therefore possession for twenty years does not constitute a marketable or safe title.

It follows, from what I have above stated, that no purchaser can be satisfied with a vendor's title depending solely on an undisturbed possession of twenty years; as the person to whom such possession may have been adverse may be only a tenant for life, or may have been at the time when the adverse possession commenced under some of the disabilities noticed in the 16th section. In all cases, therefore, a vendor, in undisturbed possession for twenty years, must, by the production of the previous title, show, either that he lawfully obtained such possession, and that he has the estate and interest which he professes to sell, or that his possession, being adverse, the estates and interests of the parties rightfully entitled have been barred by such adverse possession.

Abstracts must show title for as long a period as under the old system.

It is a mistake, therefore, and at present a very prevalent one amongst professional gentlemen who have not duly considered the subject, to suppose that in consequence of the new Statute of Limitations, a purchaser will not be warranted in requiring the abstract of title to go so far back as under the old system. I have known an instance of a person being tenant for life for more than eighty years. Such a person might have been dispossessed at the time when his right first accrued. An adverse possession to him during the whole period of his life, would not have made a good title against the remainder-man or reversioner under the old law, nor will it do so under the new law.

The measure of the period fixed for the deduction of titles, is the limitation, not to a writ of right, but to the life of man.

It is a common notion that the present length of abstracts is with reference to the limitation of sixty years. This is quite a mistake. It is with *reference to the duration of human life;* and so long as the law will not allow a remainder-man expectant on an estate for life to be barred by a possession adverse to the tenant for life, a purchaser will be entitled to require a title to be shown for the same period as heretofore under the old law.

Titles to advowsons must be deduced for one hundred years.

Advowsons are specially provided for by the 30th, 31st, 32d and 33d sections, and the length of abstracts as to them must be with reference to the period of one hundred years fixed by the last of those sections. The provisions in these sections are very salutary, as, according to the old law, no person purchasing an advowson could ever be pronounced safe, since the old statutes of limitation did not apply to advowsons.

(Signed) P. B. BRODIE.

QUESTIONS

RELATIVE TO THE

EXISTING DIVISION OF THE OWNERSHIP

INTO

LEGAL AND EQUITABLE.

*** These questions (which are referred to *suprà*, p. 41), were suggested to the Writer by considerations connected with the plan of a General Registry, though the connection is not immediately apparent (but see the Tract alluded to in the Preface to this work), and were drawn up in consequence of certain alterations contemplated by the Real Property Commissioners, and certain questions (*a*) prepared by them.

1. If the limitation of a use upon a use had not been excluded from the operation of the Statute of Uses, what would have been the state of the law of real property under that statute, with reference as well to passive uses, imposing no duty upon the grantee, as to active uses, imposing a duty upon him?

2. Was not the construction put upon the statute absurd, inasmuch as if before the statute land had been conveyed to A. to the use of B., to the use of C., a purchaser, the *use* would have belonged to C., and not to B., in whom nevertheless a statute designed to transfer *uses* into possession is made to deposit the estate?

3. Has not this perverse construction led to the frequent separation of the equitable or beneficial right from the legal estate, and has not such separation rendered titles complex

(*a*) These questions will be found at the end of the volume.

and precarious, and judicial proceedings vexatious and circuitous?

4. Is not the legal estate often fixed in a stranger, contrary to the manifest intention; as where an appointment is made unto A., to the use of B., or it is declared that a fine or recovery shall enure unto A., to the use of B., and is not such an accidental disunion of the legal estate and beneficial right often productive of much expense and inconvenience?

5. Have not courts of law struggled to mitigate the inconvenience of passive trusts, by *presuming* re-conveyances and surrenders of legal estates; and has not the doctrine of presumption, regardless alike of moral probability and the practice of conveyancers, aggravated the evil, by introducing great uncertainty into titles?

6. Do not parties incur great expense and delay in obtaining conveyances of dry legal estates from infants, lunatics, &c.; and ought not a direct and simple adjudication to be substituted for the operose and seemingly absurd expedient of directing an infant or a stranger to convey, (*a*) like a mere machine, the one incapable of volition, and the other destitute of both discretion and estate?

7. What are the principal motives inducing the intentional creation of passive trusts?

8. Is not the existence of such trusts attributable mainly to two causes—first, the difference between the condition of the legal estate and equitable right (the latter enjoying an exemption from the rules of tenure, &c.) and, secondly, the continued residence of the estate in trustees and mortgagees after the purposes for which it was conveyed have been fulfilled?

(*a*) See 1 Will. 4, c. 60.

9. Do not active trusts commonly exceed their just limits, as well by absorbing a larger portion of the legal estate than their purposes require, as by intercepting, while in a quiescent state, the legal dominion of the persons who, subject to such trusts, are entitled to the ownership of the land?

10. If the legal ownership could be modified and aliened with as much facility as the equitable right, and were relieved from certain consequences of tenure (as liability to *forfeiture*), would any inconvenience arise from all interests in land being purely legal, and is it not fit that the artificial distinction between common law estates, uses, and trusts, should be taken away, and all the purposes of settlement and alienation be attainable at law by direct means?

11. Would the effect of such a change be to enable parties, with facility, to make dispositions, and assert rights, which at present can be made or asserted only by artificial and indirect methods?

12. When those interests which are now dependant on the accident of notice (i. e. equitable interests) shall be rendered permanent by means of a register, would they not become, in effect, ownerships of the land itself, and as such, proper objects of legal jurisdiction?

13. Upon what footing ought *active* trusts to be placed, so as to confine their interference with the legal ownership of the land strictly to the purposes of their creation?

14. Do not legal rights of entry, and legal authorities, as distinguished from legal estates, afford the means of investing active trustees with a dominion exactly commensurate with the purposes of the trust?

15. Considering that the grant of a growing crop would

confer on the grantee a right of entry for the purpose of reaping and carrying it away, why should a conveyance of the land to him upon trust to effect that single purpose have any other or greater effect, seeing that the transactions are substantially the same; and why should not a court of law be authorized to hold equally in the latter case, as in the former, that the dominion is restricted to the act to be performed?

16. Is not the common law judge in the habit of looking at the nature and scope of the trust, in order to determine what estate ought to be taken by the trustee where the disposition is indefinite?

17. If A., owner of an equitable fee, assume to convey to B. and his heirs, upon trust that B. or his heirs shall sell the land, will not B. have merely an *office*, and if he die before a sale, will not such office descend or devolve upon his heir—either the *hæres natus* or the *hæres factus?*

18. If A., owner of an equitable fee, assume to convey to B. and his heirs, upon trust that B. or his executors or administrators shall sell the land, will not B. have merely an *office;* and if he die before a sale, will not such *office* be transmitted to his executor or administrator, nothing descending to his heir?

19. If A., owner of an *equitable* fee, assume to convey to B. and his heirs, by way of mortgage, has not B. merely a *pledge*, enabling him to sequestrate the estate to the extent of satisfying the debt; and, on his death before payment of the money, is not his whole interest transmitted to his executor or administrator, nothing descending upon the heir?

20. In each of the preceding examples of a conveyance by A., an equitable owner, does not the effect of the instrument,

purporting to be a conveyance to B. and his heirs, determine *ipso facto* on satisfaction of the purposes of such conveyance, the equitable ownership of A. in the mean time experiencing no other interruption than the actual execution of the office, or enforcement of the pledge, must necessarily occasion?

21. Availing ourselves of the facilities afforded by the legal and equitable principles adverted to in the preceding questions, might we not, instead of the present division into legal estates and equitable rights, divide the dominion over land into *ownerships* and *offices*, so that, for example, if a legal conveyance were made by A. to B. and his heirs, upon trust to raise a sum of money by sale or mortgage, and, subject thereto, in trust for A., the trustee (B.) would have nothing more than an office with legal *rights* and *authorities* adequate to its execution, but pending the exercise of which, A.'s ownership would not be disturbed, and after the exercise of which, it would be disturbed only to the extent of the interest or charge thereby created?

22. Might not the *office* be descendible, and transmissible, according to the rules which govern the devolution of estates in the land, and would it be convenient to provide in any case for its devolution upon the personal representative, either in addition to or in exclusion of the real representative, (who may be an infant, &c.)?

23. While the common law judge would mete out the dominion requisite to the fulfilment of the duties of the office, might not the equity judge continue to preside exclusively over the discharge of those duties; so that law and equity would still be directed and confined to their legitimate objects, but the functions of the legal judge would be exercised in a manner more conformable to reason and justice?

24. Would not the plan suggested afford the most effectual

remedy for the evils occasioned by the necessity of either procuring or presuming reconveyances of legal estates—of using the name of the trustee in proceedings at law—and of resorting to courts of equity solely because the dry legal estate is outstanding?

25. Is it not to be feared that any attempt to give direct legal remedies to persons having mere equitable rights, without clothing such rights with the legal estate, would be productive of confusion, and, indeed, does not the proposal that an action *at law* shall be maintainable by an *equitable* owner involve something like a contradiction in terms?

26. Does the peculiar constitution of our judicature present any and what obstacles to the proposed alteration in the condition of the ownership?

OBSERVATIONS

ON

RESULTING USES.

*** Referred to, *suprà*, p. 33.

THE limitations in a deed operating under the Statute of Uses, must, in their creation, be either— Limitations in conveyances to uses must be—

1. Vested,—conferring, therefore, legal estates, (as where the land is limited to A. for life, remainder to B., for life or in tail, remainder to C. in fee, or to A. for life, remainder to B. for life, or in tail,) in which case the whole use of the fee simple, (in the first example,) or such portion of the use as the limitations embrace, (in the second example,) is immediately drawn out of the grantor, covenantor, &c. and executed in the *cestui que use* by the statute, and the undisposed of residue of the use, (in the second example,) results to, or remains in, the grantor, &c. as a reversion expectant on the particular estates created by the limitations;—or, Vested,

2. Not vested, and not, therefore, conferring legal estates, (as to the heirs of the body of B. a person now living, or to A. for life, if he shall return from Rome, remainder to the heirs of the body of B. now living, or from and after Christmas-day next to A. in fee,) in which case the *whole* use of the fee simple results to, or remains in, the grantor, &c. subject to be drawn out of him to the extent of the estates to be conferred by the limitations on their becoming vested, either as remainders, if eventually capable of effect as such, (for in the second example, the limitation to the heirs of the body of or not vested,

B. would be good as a contingent remainder, if A. should return from Rome in B.'s lifetime,) or if not so capable, and if confined within the bounds prescribed by the rule against perpetuities, then as springing or future uses;—or,

or partly vested and partly not vested.

3. Partly vested, and partly not vested, (as to A. for life, remainder to the heirs of the body of B. a person now living, remainder to C. in fee; or to A. for life, and at the end of one year, or one day after his death, to the heirs of the body of B.) in which case such portion of the use as the vested limitations embrace, is immediately drawn out of the grantor, &c. and executed in the *cestuis que use* by the statute; and the undisposed of *residue* of the use results to, or remains in the grantor, &c. as a reversion, expectant on the particular estates created by such vested limitations, subject to be drawn out of him to the extent of the estates to be conferred by the remaining limitations on their becoming vested, either as remainders, or as springing or future uses.

The foregoing propositions of course assume, that in deeds taking effect by transmutation of possession, there is nothing to rebut the supposed resulting use, and fix it in the feoffees, releases, &c.; and it should be observed that the legal use will not result to the grantor, releasor, &c. where it would defeat the intent of the conveyance by merging a particular estate expressly limited to the grantor, releasor, &c.

Assuming these positions to be accurate, it would seem to flow from them as a necessary consequence, that by no possibility can a *particular* estate of freehold in any case result to, or remain in, the grantor, covenantor, &c.—for,

In every case either, the whole use results, or no use results,

1. Where no limitation is vested, less than the *whole* use of the fee simple cannot result or remain;—and,

2. Where all or some of the limitations are vested, and absorb the whole use of the fee simple, *nothing* can result or remain;—and,

or the use of the ultimate fee results.

3. Where all or some of the limitations are vested, but do not absorb the whole use of the fee simple, the *residue* of the use (being the ultimate remnant of the ancient use) will

result or remain, as a reversion expectant on such portion of the use as passes in the particular vested estates.

The grantor, &c. cannot, therefore, be *in* of a *particular* estate of freehold, as part of his old use, whereof he hath not disposed, because if he make a *partial* disposition of the use, it must be in some particular vested estate or estates, and such particular estate or estates being deducted, the residue will be the use of the *ulterior* fee simple.

PRECEDENTS

OF

ASSURANCES.

I. AT THE COMMON LAW.
II. UNDER THE STATUTE OF USES.
III. MIXED.
IV. UNDER THE STATUTE FOR ABOLISHING FINES AND RECOVERIES.

PART I.

Assurances at the Common Law.

Feoffment.

No. 1.

Ancient Charter of Feoffment.

KNOW ALL MEN, PRESENT AND TO COME,(1) That I [*feoffor*] have given and granted, and by this my present charter have confirmed (2) unto [*feoffee*] for a certain sum of money in hand paid by him to me, one acre of my arable land lying in ———, adjoining the land formerly of ———,(3) TO HAVE

Operative words.

Parcels.

(1) It will be observed that this feoffment is by *deed-poll*, which, if there be no recital, usually speaks in the first person, beginning, "KNOW ALL MEN BY THESE PRESENTS that I, A. B., of, &c., do, &c." But when recitals are introduced, it speaks in the third person, beginning, "TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, A. B., of, &c., sends greeting," and proceeding, WHEREAS, &c. NOW THESE PRESENTS WITNESS," &c.

Deeds poll.

(2) The land passed (and still passes) by the *livery*, of which the charter of feoffment was merely the record or written evidence; hence the language of the instrument "*have* given and granted, and by this my present charter have *confirmed*," and hence, perhaps, the prevailing practice of employing operative words in the past and present tense, "*Hath* granted, bargained, sold, released and *confirmed*, and, by these presents, *Doth* grant, bargain, sell, release and confirm," which are introduced into all modern conveyances, whether of real or personal property, without regard either to the reason of the ancient form, or to the form itself.

Origin of "*hath* granted," &c.

(3) The "all estate" clause would not have been in character with the assurance, of which the livery was the operative part. Livery was made of the *possession*, or seisin, and not of the *estate*, or interest, of the feoffor. And although the "all estate" clause is now commonly inserted, as well in feoffments as in other conveyances, yet it is properly omitted where the

As to "all estate" clause in feoffments.

HABENDUM and TENENDUM.

AND TO HOLD the aforesaid acre of land, with all its appurtenances, to the said [*feoffee*], his heirs and assigns, of (4) the chief lords of the fee, rendering and doing yearly to the same

Warranty.

chief lords the services therefore due and accustomed. And I, the aforesaid [*feoffor*], and my heirs and assigns, all the aforesaid acre of land, with all its appurtenances, to the aforesaid [*feoffee*], and his heirs and assigns, against all men will warrant for ever. IN WITNESS whereof to this present charter I have put my seal: These being witnesses,(5) [*names of witnesses,*] and others. Given at ———, on ——— day next before the feast of Saint Mary the Virgin, in the ——— year of the reign of King ———.

Hils testibus.

Date.

(L.S.)

Memorandum of Livery indorsed on the above Feoffment.

BE IT REMEMBERED, that on the day and year within written, full and peaceable seisin of the within-mentioned acre,

feoffment is made with the intention of creating a disseisin, and where, of course, the feoffor contemplates the acquisition of a tortious fee, and not merely the passing of his lawful estate and interest. The practitioner should, however, be cautioned against relying, at this day, on the forcible operation ascribed to feoffments in the old books, and particularly against the experiment of making a feoffment for the purpose of transforming a long term of years into a fee. See *Doe* v. *Lynes*, 3 Barn. & C. 388; 5 Dowl. & R. 160. The tortious operation of assurances has been so much discountenanced of late, that some conveyancers of eminence appear to have thought that the effect of even a fine *sur conusance de droit come ceo, &c.* levied by a legal tenant for life, might have been so corrected by the deed leading or declaring the uses, as to prevent a forfeiture.

Modern doctrine as to disseisin, &c.

Tenendum.

(4) The *tenendum*, "To hold," is still retained in conveyances, but as tenure is a consequence of law, which the party cannot controul, (*suprà*, 8,) words expressing of whom, and by what services, &c. the land shall be holden, are (except upon a sub-grant or lease reserving rent, &c.) very rarely, and never usefully inserted.

(5) When a deed was denied, process issued to bring in *all* the witnesses *named in the deed*. The names of the witnesses are not now inserted in the deed.

with the appurtenances, was given and delivered by the within-named [*feoffor*] to the within-named [*feoffee*], in their respective proper persons, according to the tenor and effect of the within-written charter, in the presence of [*names of witnesses*], and others.

No. 2.

FEOFFMENT *by a Tenant in Fee in Possession to another for Life, Remainder for Life, Remainder in Tail, Reversion to the Feoffor, with Powers of Attorney to deliver and receive Seisin.*

THIS INDENTURE, made the ——— day of ———, in the year of our Lord ———, BETWEEN [*feoffor*], of [*residence and quality of the party*], of the one part, and [*feoffee*], of, &c., eldest son and heir apparent of the said [*feoffor*] of the other part, WITNESSETH, that the said [*feoffor*], in consideration of the marriage heretofore solemnized between the said [*feoffee*] and [*Christian name of feoffee's wife*], his wife, formerly [*maiden name*], spinster, and in consideration of the natural love and affection which the said [*feoffor*] bears towards his son, the said [*feoffee*], and grandson [*son of feoffee*], the eldest son and heir apparent of the said [*feoffee*], and for other good causes and considerations him the said [*feoffor*] hereunto moving, Hath given, granted, and enfeoffed, and by these presents Doth confirm unto the said [*feoffee*], All, &c. [*parcels*] (of which said hereditaments the said [*feoffor*] is seised in fee simple), Together with all the rights, members and appurtenances thereunto belonging. And also all the estate, right, title and interest, at law or in equity, of the said [*feoffor*], in or to the said hereditament and premises, and every part thereof, with their appurtenances, And all deeds and muniments in his possession or power relating thereto, To HAVE AND TO HOLD the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with

Date. Parties. TESTATUM. Consideration. Operative words. Parcels. "All estate" clause. Deeds. HABENDUM.

Particular estate for life.

their appurtenances, unto (6) the said [*feoffee*] and his assigns, during his natural life, without impeachment of waste;

Common law limitations—rules concerning them.

(6) It will be observed that all the limitations in the text, consisting of a particular estate, remainders, and reversion, arise at the common law. The habendum is immediate—" unto" the first taker for life, and after his decease, " unto" the next taker, &c. In order that the limitations may be valid in this shape, they must conform strictly to the rules of the common law. The first limitation may be for years only, as, habendum to A. for the term of 100 years, and from and after the expiration or sooner determination of that term, to B. for life, &c. (in which case the livery is made to A.; Litt. s. 60): but the first freehold limitation must confer a vested estate, and the subsequent freehold limitations must be so framed as to expect, or depend, on the determination, by natural or legal means, of the preceding freehold limitations. If the habendum were " to A., from Christmas next, for his life, and after his death, to B." &c., or " to the unborn child of A. in tail, and after the death of such child without issue, to B." &c., all the limitations would be void at law; Shep. Touch. 219: and if the habendum were " to A. for a term of years, and, subject to that term, to B., from Christmas next, for his life, or to the unborn child of B." with limitations over, the limitation to B. or to his unborn child, and all the subsequent limitations, would be void at law; Co. Litt. 48, b. So, if the habendum were " to A. for life, and after his death *and one day*, to B.," or " to A. *in fee*, and if he shall die without issue living at his death, to B.," the limitation to B. would be void at law. But the introduction of a few additional words changes the whole result of the conveyance. For if the habendum were " to A. and his heirs *to the use of* A. from Christmas next, for his life, and after his death to the use of B." &c., the limitations would be valid, because the habendum " to A. and his heirs," imports a seisin of the fee in A., conformably to the rules of the common law, while the limitations take effect as springing *uses* engrafted upon that seisin, and consequently need not conform to those rules;—and so, of the other examples. Although limitations in conveyances of estates of freehold tenure are commonly created by way of use, yet it is by no means unimportant to the practitioner to obtain a correct knowledge of the rules which govern the creation of estates at the common law, inasmuch as the *seisin* to serve uses raised by transmutation of possession, must be created by a common law conveyance. To exemplify the practical importance of such knowledge, suppose that, in the ordinary case of a strict settlement before marriage, the draughtsman, instead of conveying to A. and B. and their heirs, to the use of the settlor and his heirs till the marriage, and after the marriage, to the uses of the settlement, were to convey,

Practical value of a knowledge of those rules.

and immediately after his decease, (7) unto the said [*Christian name of feoffee's wife*], the wife of the said [*feoffee*] and her assigns, during her natural life, without impeachment of waste; and immediately after her decease, unto the said [*son of feoffee*] and the heirs male of his body; (8) and on failure of such issue, unto the right heirs (9) of the said [*feoffor*] for

Remainder for life.

Remainder in tail.

Remainder in fee.

by feoffment, or lease and release, to A. and B. and their heirs from and after the solemnization of the marriage, but to the uses of the settlement, the conveyance of the land, and consequently the uses, would be void at law, and the only result would be a contract in equity; because the conveyance so framed would purport to confer upon A. and B. an estate of inheritance *in futuro*.

(7) The limitations should form a regular chain, each being linked on to the limitation immediately preceding: as, "to A. for life, and after his death to B. for life, and after *his* (B.'s) death, (not "after the death of the survivor of A. and B.") to C.;" or "to A. for life, and after his death to B. and the heirs of his body, and on failure of such issue, (not "after the death of A., and the death and failure of issue of B.") to C." Where the limitations are numerous, to usher in each successive limitation by recapitulating the events in which all the preceding limitations are determinable, would be to accumulate words at compound interest, and make the deed read like "The house that Jack built," to say nothing of the imminent danger of failure in the process, of which the student who attempts to repeat the above diverting history will be well convinced. Again, in the limitation of a remainder, it is usual to contemplate only the natural or regular determination of the preceding estate, as, "to A. for life, and after his death, (not "after his death or on the forfeiture or surrender, &c. of his estate,") to B."

Particular estates and remainders, how to be limited.

(8) It is quite unnecessary to add, "lawfully begotten," or "lawfully issuing," or any other expressions of the like import, in order to create an estate tail even in a deed. It is enough if the word *heirs* be used, and the person from whom the issue is to proceed be ascertained. In framing limitations to *children*, as purchasers, it is abundantly sufficient to say, "the children of A.," or "the children of A. by B.," or "the children of the intended marriage." The vulgar form, "the children of the body of A., on the body of B., his (A.'s) intended wife, lawfully to be begotten," is the product of a confused notion of the legal rules relative to the creation of an estate tail.

Words "lawfully begotten," &c.

(9) This limitation being to the right heirs of the *feoffor*, merely expresses the legal destination of that undisposed of remnant of his former fee, which would revest in him *sub silentio*. It is therefore immaterial whether

Limitation to right heirs of grantor,

Qualified warranty of title.

ever. And the said [*feoffor*] hath granted for himself and his heirs, that he, the said [*feoffor*] and his heirs, the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, unto the said [*feoffee*], during his natural life, with remainders over as aforesaid, according to the tenor and effect of these presents, against him, the said [*feoffor*], and against all persons rightfully claiming through or under him, or through or under any of his ancestors, shall and will for ever warrant and defend, by these presents. And the said [*feoffor*] doth hereby constitute and appoint [*names and additions of attorneys to deliver seisin*], (10) jointly, and each of them severally, to be the attorneys and attorney of the said [*feoffor*], for him and in his name to enter upon the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, or upon some part thereof in the name of the whole, and after such entry in the name of the said [*feoffor*], and for him, to give and deliver seisin and possession of the said hereditaments and premises, or some part thereof in the name of the whole, unto the said [*feoffee*], in his own person or by his attorneys or attorney for that purpose authorised, to hold according to the tenor and effect of these presents, the said [*feoffor*] hereby undertaking to ratify and confirm whatsoever his said attorneys or attorney shall lawfully do by virtue of these presents. And the said [*feoffee*] doth hereby constitute and appoint [*names and additions of attorneys to re-*

Power of attorney to deliver seisin.

Power of attorney to receive seisin.

the limitation be to him and his heirs, or to his heirs; or, if made to his heirs, whether he takes an estate of freehold under the conveyance or not;—in each case the ultimate fee returns in him. Before the late stat. 3 & 4 Will. 4, c. 106, s. 3, he would have been *in* as of his old estate, but now he will take by purchase, *vide suprà*, 145. But if the limitation be to the heirs of a *stranger*, it then becomes material to inquire whether an estate of freehold is previously limited to him by the same conveyance or not. This subject is further considered, *infrà*, in a note on the rule in Shelley's case.

—to right heirs of stranger,

(10) The attorneys need not be parties to the deed. *Moyle* v. *Ewer*, Cro. Eliz. 905. But see 2 Sand. Us. 6.

ceive seisin,] jointly, and each of them severally to be the attorneys and attorney of the said [*feoffee*], for him and in his name to enter upon the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, or upon some part thereof in the name of the whole, and after such entry in the name of the said [*feoffee*], and for him to take and receive the seisin and possession of the said hereditaments and premises, or some part thereof in the name of the whole, from the said [*feoffor*], in his own person, or by his attorneys or attorney for that purpose authorised, to hold according to the tenor and effect of these presents, the said [*feoffee*] hereby undertaking to ratify and confirm whatsoever the said attorneys or attorney shall lawfully do by virtue of these presents. IN WITNESS whereof the said parties hereto have hereunto set their hands and seals the day and year first above-written.

Attestation of Execution to be indorsed on the preceding Feoffment.

SIGNED, (11) sealed and delivered, (being first duly stamped,) by the within-named (12) [*feoffor and feoffee*], in the presence of us, (13) [*names and additions of witnesses.*]

(11) Signing is not essential to a deed, by either the common law or the statute law, unless it be considered that the Statute of Frauds, 29 Cha. 2, c. 3, ss. 1 & 3, requires deeds relating to land to be signed; but see Shep. Touch. by Preston, 56, n. 24. Where a *power* is given to be exercised by a deed signed by, or under the hand of the donee of the power, signing is of course essential, and if the power requires the deed to be attested, the omission of the fact of signature in the attestation is fatal; for the Act of 54 Geo. 3, c. 168, passed to supply such omissions, is not prospective. Of signing deeds.

(12) The attestation should always express to whose execution it is applicable. A power was given to husband and wife to be executed by deed signed, sealed, and delivered, in the presence of, and attested by, &c. The attestation of a deed of appointment, duly signed and sealed by the joint donees, ran thus, "signed, sealed and delivered (not stating by whom,) in the presence of." The title derived under this deed was pronounced doubtful and unmarketable. Attestation of deeds.

Memorandum to be indorsed on the preceding Feoffment of Livery of Seisin.

BE IT REMEMBERED, that on the day of the date of the within-written indenture, peaceable and quiet seisin and possession of the within-mentioned hereditaments were taken by the within-mentioned [*attorneys to deliver seisin*], for and in the name of the within-named [*feoffor*], pursuant to the letter of attorney in that behalf contained in the within-written indenture, and were immediately afterwards delivered by the said [*same attorneys*], for and in the name of the said [*feoffor*], to the within-mentioned [*attorneys to receive seisin*], for and in the name of the within-named [*feoffee*], pursuant to the letter of attorney in that behalf contained in the within-written indenture, To hold according to the tenor, form, and effect of the within-written indenture. In the presence of [*subscriptions of witnesses, with their additions*].

Exchange.

No. 3.

EXCHANGE *between a Tenant in Fee and a Tenant for Life and Remainder-man in Fee.*

Date. THIS INDENTURE, made the —— day of ——, in the year

Parties. of our Lord ——, Between [*tenant in fee,*] of, &c. of the one part, and [*tenant for life,*] of, &c. and [*remainder-man in fee,*] of, &c. of the other part.

Recitals —of seisin in fee of a close of land, WHEREAS the said [*tenant in fee*] is now seised of the fee-simple in possession of the close of land or ground hereinafter described, with the appurtenances.

—of seisin for life, with remainder in fee, of a messuage. AND WHEREAS the said [*tenant for life*] is now seised in possession for the term of his natural life, without impeachment of waste, with the immediate remainder to the said [*remainder-man*] in fee simple, of the messuage or tenement

Number of witnesses. (13) Powers are commonly, though unnecessarily, so framed as to require two or more witnesses; otherwise, it seems better to have only one witness to a deed, as rendering the proof more easy and certain.

hereinafter described, with the appurtenances. AND WHEREAS the said [*tenant in fee*] on the one part, and the said [*tenant for life*] and [*remainder-man*] on the other part, have agreed to make an exchange between them of the fee-simple in possession of the said close of land or ground, with the appurtenances, for the fee-simple in possession (14) of the said messuage or tenement, with the appurtenances, the said [*tenant for life*] and [*remainder-man*] paying to the said [*tenant in fee*] the sum of £——, for equality of exchange. (15) NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited agreement, and in consideration of the convey-

—of agreement for exchange.

TESTATUM.

(14) This being an exchange at the common law, it is requisite that the exchanging parties should be upon a footing of equality in point of estate, and that the transaction should be completed by actual entry. But as well conveyances requiring livery, as conveyances requiring entry, have fallen into disuse. The modern lease and release (*suprà*, 60.) has superseded them all. Exchanges are now commonly effected by mutual conveyances, adapted to pass the land without entry. Such conveyances are valid without any of the requisites of a common law exchange; for property of any given kind may be *bartered* for property of the same or any other kind, and the bargain may be completed by adopting the modes of assurance suitable to the transfer of the respective properties; but unless the relative condition of the parties, and the subject-matter, would have admitted of an exchange at the common law, the incidents of such an exchange cannot belong to the transaction. In every case, the better course appears to be, to proceed upon the basis of a reciprocal sale—the consideration being land instead of money—and for each party to investigate the other's title, as upon a purchase, in order that mutual conveyances may be executed in the ordinary form, with the usual qualified covenants for title. Each title will thus be independent of the other; whereas, a vendor, deriving his title under a *proper* exchange made within sixty years, is obliged to show the titles to both estates; unless, indeed, he can prove that the *fee* of the lands exchanged *away* has since been aliened, for the implied right of re-entry does not pass to an *alienee*. But note, that the writ of *warrantia chartæ* is abolished by the act 3 & 4 Will. 4, c. 27, s. 36.

Exchange at common law, distinguished from other exchanges.

Mutual conveyances recommended.

(15) The ad valorem duty attaches, as upon a sale, in respect of the money paid for equality of exchange. But upon an exchange or barter of one subject of property for another, neither subject consisting wholly or in part of a gross sum of money, no ad valorem duty is payable.

Stamp duty on exchanges.

ance and assurance by the said [*tenant for life*] and [*remainder-man*] hereinafter contained, and also in consideration of the

Money payment for equality of exchange.

sum of £——, of lawful British money paid by the said [*tenant for life*] and [*remainder-man*], in proportion to their respective interests, to the said [*tenant in fee*], at or before the execution of these presents, the receipt of which sum the said [*tenant in fee*] hereby acknowledges, and from the same sum and every part thereof hereby acquits, releases and for ever discharges the said [*tenant for life*] and [*remainder-man*], their heirs, executors, administrators and assigns, The said

Tenant in fee conveys to tenant for life,

[*tenant in fee*] Hath given, granted and confirmed, and by these presents Doth give, grant and confirm unto the said

—a close of land.

[*tenant for life*],(16) All that close of land or ground situate in the parish of ——, in the county of ——, heretofore called or known by the name of ——, and described to contain, by estimation, one acre, but now called or known by the name of ——, and found by a recent admeasurement thereof to contain one acre and one rood, be the same more or less, Together with all ways, trees, hedges, ditches, fences, profits, advantages, rights, members and appurtenances to the said

HABENDUM,

close of land or ground belonging or appertaining, To HAVE AND TO HOLD the said close of land or ground, hereditaments and premises hereinbefore given, granted and confirmed, with

—for life,

the appurtenances, unto the said [*tenant for life*] and his assigns, for the term of his natural life, without impeachment

—remainder in fee.

of waste; and immediately after his decease, unto the said [*remainder-man*], his heirs and assigns for ever, IN EXCHANGE (17) for the messuage or tenement hereinafter given,

In exchange for messuage.

Exchange by lease and release.

(16) By inserting in this place (in each testatum) the "actual possession" clause, and inserting the "all estate" clause immediately before the habendum, and by changing the operative words into "grant, release and confirm," the precedent in the text may be adapted to an exchange by lease and release.

Force of the word "exchange."

(17) The word "exchange" is essential to produce the effects of a *common law* exchange, but in no other point of view. This word, and the word "heirs," afford almost the only instances in which a rigid adherence to technical expressions is necessary even in deeds.

granted and confirmed by the said [*tenant for life*] and [*remainder-man*]. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and in consideration of the conveyance and assurance by the said [*tenant in fee*] hereinbefore contained, The said [*tenant for life*] and [*remainder-man*] Have, and each of them Hath given, granted and confirmed, And by these presents Do, and each of them Doth give, grant and confirm unto the said [*tenant in fee*], All that messuage or tenement situate in the parish of ——, in the county of ——, formerly in the tenure or occupation of ——, late in the tenure or occupation of ——, and now in the tenure or occupation of ——, Together with all outbuildings, yards, gardens, walls, fences, lights, ways, watercourses, easements, rights, members and appurtenances to the said messuage or tenement belonging or appertaining, To HAVE AND TO HOLD the said messuage or tenement, hereditaments and premises lastly hereinbefore given, granted and confirmed, with the appurtenances, unto the said [*tenant in fee*], his heirs and assigns for ever, IN EXCHANGE for the close of land, hereditaments and premises hereinbefore given, granted and confirmed by the said [*tenant for life*] and [*remainder-man*], Provided nevertheless, (18) that if either of the parties to this exchange, or the heirs or assigns (19) of either of them, shall at any time hereafter be lawfully evicted or ejected of or from the possession of the hereditaments and premises hereby given, granted and confirmed to the same party, or any part thereof, by reason of any right or title paramount or precedent to the exchange hereby made, then it shall be lawful for the other party, or the heirs or assigns of the other party, to re-enter upon the hereditaments and premises hereby given, granted and confirmed by the

2d TESTATUM.

Tenant for life and remainder-man convey

—a messuage, &c.

HABENDUM,

—in fee.

In exchange for close.

Clause of re-entry on eviction.

(18) A clause to this effect is commonly inserted in exchange deeds, but its efficacy and propriety are questionable. See 4 Jarm. Conv. 88. Eviction clause.

(19) See conclusion of note (14), *supra*.

same party, or into or upon any part thereof in the name of the whole, and to repossess and enjoy the same hereditaments and premises, as in his or their former estate, and thenceforth the exchange hereby made shall be void. In WITNESS, &c.

MEMORANDUM *of Mutual Entry to be indorsed on the preceding Exchange.*

BE IT REMEMBERED that on the day of the date of the within-written indenture, the exchange thereby made was duly perfected by the actual entry of the respective exchanging parties into or upon the respective hereditaments given to them in exchange, in the presence of us. [*Names and additions of witnesses.*]

Lease.

No. 4.

LEASE (*or Demise*)(20) *of a Furnished Dwelling-House, Gardens, Pleasure-Grounds, and Lands.*

TESTATUM. THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*lessor*] of, &c. of the one part, and [*lessee*] of, &c. of the other part,(21) WITNESSETH, that in consideration of the yearly rents, covenants and conditions hereinafter respectively reserved and contained by the said [*lessee*], his executors, administrators and assigns, to be re-

Lease at common law. (20) An example of a lease (or demise) operating necessarily and exclusively at the common law, cannot easily be given, because the rent reserved is alone sufficient to raise a use, and make the instrument operate as a bargain and sale.

Of recitals in leases. (21) Recitals are of rare occurrence in leases. Even where the lease is granted pursuant to a power, a general reference, in the testatum, to the power, commonly supplies the place of a recital, but it is better to recite the deed creating the power, showing the estate of the donee of the power, and setting forth the power fully; and a covenant should be added for the production of the deed.

spectively paid, observed and performed, The said [*lessor*] Hath demised and leased, and by these presents Doth demise and lease unto the said [*lessee*], All that messuage or dwelling-house, situate in the parish of —— aforesaid, and commonly called or known by the name of ——, with the out-buildings, gardens and pleasure-grounds thereunto belonging, Also the fixtures and furniture in or belonging to the said messuage or dwelling-house comprised in the schedule or inventory hereunto annexed, Also all that close of meadow or pasture land lying in front of the said messuage or dwelling-house, and containing —— acres or thereabouts, Also all that close of arable land adjoining to the said close of meadow land, and containing —— acres, or thereabouts, Also all that piece or parcel of wood ground, lying near to the said messuage or dwelling-house, with the shrubbery and walk through the same, containing —— acres or thereabouts, All which premises are now in the occupation of the said [*lessee*], and are delineated in the plan drawn in the margin of these presents, Together with all the rights, members and appurtenances whatsoever to the said premises belonging or appertaining, To HAVE AND TO HOLD the said hereby demised premises, with their appurtenances, unto the said [*lessee*], his executors, administrators and assigns, for the term of —— years, to be computed from the —— day of —— last, YIELDING and paying therefor unto (22) the said [*lessor*], his heirs or

Operative words.

Parcels.

HABENDUM,

—for term of years.

REDDENDUM,

(22) When the lease is granted under a power of leasing given to a tenant for life, the better plan is to reserve the rent generally, without stating by whom it is to be received; and the same observation applies to every case in which the circumstances of the title would render the framing of a reservation in favour, expressly, of the persons entitled to the reversion, difficult or hazardous. The reservation may declare (adopting the usual language of powers to lease), that the rent shall be "incident to the reversion;" but the law, without the aid of any declaration, gives the rent to the reversioner for the time being. It may be useful to remark, that a tenant for life, with power of leasing, &c. departing with his life estate, or demising for a term of years, to a mortgagee or annuitant, should expressly

Leases under powers—reservation of rent.

Caution as to powers of tenant for life aliening.

—of a yearly rent payable half-yearly,

assigns, during the said term, the yearly rent of £——, of lawful British money, in even portions half yearly, on the —— day of ——, and the —— day of —— in every year,

—of an additional rent per acre for meadow or pasture broken up.

ALSO YIELDING and paying during the said term, unto the

stipulate (if such be the understanding of the parties,) for the right of exercising his powers notwithstanding the conveyance or demise. The stipulation may be to this effect:—"Provided, nevertheless, that these presents "shall not extinguish or suspend any of the powers, authorities or discre- "tions, [*or* the power of leasing, *or any other specified powers*,] given to "the said [*tenant for life*], by the said recited indenture of settlement, but "every such power, authority and discretion shall be exercisable by the "said [*tenant for life*], without the concurrence of the said [*grantee of tenant "for life*], his (heirs) executors, administrators or assigns, as effectually "as if these presents had not been made." With reference to the effect of alienation by tenant for life upon powers appendant (as they are termed) to the life estate, the late case of *Long* v. *Ranken*, Sugd. Pow. 5th edit. App. n. 5, is particularly important. The view there taken by Lord Tenterden of powers to appoint the use, appears to be the result of a clear and accurate perception of the principles on which they really operate. The learned judge seems to reject the notion which treats the estates arising under them as taking effect wholly or partially out of the estate of the donee of the power and refers them, on that ground, to a separate class, when he observes,—"a leasing power given to a tenant for life is usually spoken of in our books "as a power appendant to the estate of the tenant for life, and it is said "that the estate of the lessee is in such a case derived out of the estate of "the tenant for life, for such period of the term as he may happen to live. "It would probably be more correct to say that it operates *upon* that estate, "than to say it is derived *out* of it *even during that period*." In truth, uses limited in execution of powers, always receive their legal character from the impression originally communicated to the seisin raised to serve all the uses, limited and to be limited, by or under the conveyance containing the power, and are wholly independent of the estate of the donee. However convenient it may be to divide powers into powers appendant, powers in gross, &c. yet that division is rather formal than substantial. The execution of the ordinary power of leasing operates *upon* the estate of the tenant for life because that estate is a component part of the fee upon which the power is superinduced. The most remarkable feature in the doctrine of powers (and it must be considered an anomaly) is, that a power *simply collateral*, as, for example, a power of revocation and appointment, given by a settlement to a stranger, taking no estate in the land, cannot be released by the donee. Of

Powers appendant,—their mode of operation.

Powers simply collateral—their indestructibility.

said [*lessor*], his heirs or assigns, on the days aforesaid, (in addition to the said yearly rent of £——, hereinbefore reserved,) for every acre of meadow or pasture ground which the said [*lessee*], his executors, administrators or assigns, shall plough, break up or convert into tillage, contrary to the covenant hereinafter contained, the yearly rent of £——, of like lawful money, on the days and in manner aforesaid, the first payment of the said additional rent to be made on such of the said days as shall happen next after such ploughing, breaking up or conversion into tillage as aforesaid. And the said [*lessee*], for himself, his heirs, executors, administrators and assigns, hereby covenants with the said [*lessor*], his heirs and assigns, that the said [*lessee*], his executors, administrators or assigns, will, during the said term of —— years, pay or cause to be paid unto the said [*lessor*], his heirs or assigns, at the times and in manner aforesaid, the said yearly rents hereby reserved, or such of them as shall be payable; Also that the said [*lessee*], his executors, administrators or assigns, will pay and discharge all taxes, rates, assessments and impositions, parliamentary and parochial, (including land-tax,) which during the said term shall become payable in respect of the said demised premises; Also that the said [*lessee*], his executors, administrators and assigns, will, during the said term, at his or their own expense, maintain and keep the said demised premises, (other than the said furniture,) with the walls, fences, drains, sinks, sewers and appurtenances thereunto belonging, in good and tenantable repair and condition; Also that the said [*lessee*], his executors, administrators or assigns, will, during the said term, carefully preserve the said furniture from damage or injury, (reasonable use and wear thereof only excepted,) and

Covenants by lessee,

—to pay rents,

—to pay taxes and rates,

—to repair,

—to preserve and not remove furniture,

course the donee may *refuse* it in the first instance, but having accepted it, he cannot, it seems, afterwards extinguish it. Here, then, is a species of legal dominion, of which the possessor cannot deprive himself; and the reason assigned is, the absence of an estate in the donee, which circumstance, if Lord Tenterden's doctrine be sound, does not furnish a satisfactory reason.

not remove, or suffer to be removed from the said messuage or dwelling-house, any article of such furniture. Also that the said [*lessee*], his executors, administrators, or assigns, will not, during the said term, fell, cut down, lop or top any of the timber, or other trees now growing or being, or which, during the said term, shall grow or be upon the said demised premises, (except decayed or unproductive fruit-trees in the said gardens,) but will preserve the same trees (except as aforesaid, and the shrubberies, hedges and underwood belonging to the said premises, from damage or injury by cattle or otherwise; and will also, during the said term, keep the said pleasure-grounds and other ornamental parts of the said premises in as good order as the same have been usually kept by the said [*lessor*], and not use the same otherwise than for the purposes of pleasure and ornament; Also that the said [*lessee*], his executors, administrators or assigns, will, during the said term, cause the fruit-trees and young plantations in or upon the said demised premises to be properly pruned at seasonable times of the year, and plant in the place of every decayed or unproductive fruit-tree in the said gardens, which shall be cut down by him or them, a thriving young tree of proper growth, bearing fruit of the same or the like description; Also that the said [*lessee*], his executors, administrators or assigns, will, during the said term, keep the gardens and gardening-ground belonging to the said dwelling-house well cropped and manured, and manage the same according to approved methods of gardening; Also that the said [*lessee*], his executors, administrators or assigns, will not at any time or times during the said term plough, break up or convert into tillage, all or any part of the said meadow or pasture ground, without first obtaining the licence in writing of the said [*lessor*], his heirs or assigns for that purpose; Also that the said [*lessee*], his executors, administrators or assigns, will, in every year during the said term, at the proper season, plash the hedges and scour the ditches belonging to the said demised premises, and cause all the dung, manure,

—not to cut trees except unprofitable fruit trees, but preserve the same, with the shrubberies, &c.

—to prune fruit trees and young plantations, and replace fruit trees cut down,

—to crop and manage the gardens,

—not to break up meadow or pasture,

—to plash hedges, scour ditches, spread manure, &c.

and compost, to arise from or be made upon the said demised premises, or any part thereof, to be spread or bestowed in a husband-like manner upon the land or ground hereby demised, or on such part or parts thereof as shall stand most in need of manure, and will at all times during the said term, crop, use, manage, and cultivate the land or ground hereby demised in a husband-like manner. Also that the said [*lessor*], his heirs and assigns, shall be at liberty, with or without workmen or others, twice in every year during the said term, at all convenient times of the day, to enter into and upon the said demised premises, in order to view and examine the state and condition thereof, and in case the said [*lessor*], his heirs or assigns, shall find any repairs wanting, and shall deliver to the said [*lessee*], his executors, administrators or assigns, or leave upon the said demised premises a list in writing thereof, requiring the same to be made good, then the said [*lessee*], his executors, administrators or assigns, shall, within the space of one calendar month after the delivery of such list, make good the same accordingly. Also, that the said [*lessee*], his executors, administrators or assigns, will, at his or their costs, forthwith insure, and thenceforth during the said term keep insured, the buildings erected and to be erected upon the said demised premises, from loss by fire, in the ——— office, or some other office to be approved of by the said [*lessor*], his heirs or assigns, in the joint names of the said [*lessor*], his heirs or assigns, and of the said [*lessee*], his executors, administrators or assigns, and will, on effecting the said insurance, deposit the policy with the said [*lessor*], his heirs or assigns, and at his or their request produce to him or them the receipts for the premiums of assurance, (the moneys arising from which assurance shall be laid out under the superintendence of the surveyor of the said [*lessor*], his heirs or assigns, in rebuilding or reinstating the said demised premises.) Also that the said [*lessee*], his executors, administrators or assigns, will, in the last year of the said term, permit and suffer the said [*lessor*], his heirs or assigns, or the suc-

—to permit lessor to enter and view,

—to repair after notice,

—to insure against fire,

—to permit landlord or incoming tenant to enter within the last year.

ceeding tenant, to enter, in the proper season, upon the said closes hereby demised, for the purpose of preparing the same, or any part thereof, for a crop, or of spreading manure thereon, or doing such other acts as shall be necessary or proper, according to the usual course of husbandry, in order that the said [*lessor*], his heirs or assigns, or such succeeding tenant, may derive the full benefit and advantage of the said lands as from the expiration of the said term. Also that the said [*lessee*], his executors, administrators, or assigns, will not, during the said term, occupy, use or employ the said demised premises, or any part thereof, or suffer the same to be occupied, used or employed, for any other purpose, or in any other manner than as and for the residence of a private family. Also that the said [*lessee*], his executors, administrators or assigns, will not, during the said term, assign, demise or otherwise dispose of, or part with the possession of the said demised premises, or any part thereof, or do, commit or suffer any act, matter or thing, whereby the said premises, or any part thereof, shall or may be assigned, demised or otherwise disposed of, or the possession thereof parted with, to any person or persons, for the whole or any part of the said term, without the licence in writing of the said [*lessor*], his heirs or assigns, first obtained for every (23) such purpose. Also that the said [*lessee*], his executors, administrators or assigns, will, at the expiration or other sooner determination of the said term, peaceably and quietly yield up unto the said [*lessor*], his heirs or assigns, the said demised premises, in good and tenantable repair and condition, together with the said fixtures and furniture. PROVIDED NEVERTHELESS, that if the said [*lessee*], his executors, administrators or assigns, shall be desirous of determining this demise at the end of the first seven or fourteen years of the said term, and of such desire shall give to the said [*lessor*], his heirs or assigns, six calendar months' previous notice in writing, then (the rents and cove-

—not to use the premises otherwise than as a private residence,

—not to assign or underlet without licence,

—to yield up possession at the end of the term.

Proviso enabling lessee to determine lease at the end of the first seven or fourteen years.

(23) See 4 Mann. & Ryl. 304, n.

nants hereinbefore reserved and contained being paid, observed and performed,) this demise shall determine accordingly, Provided also, that it shall be lawful for the said [*lessee*], his executors, administrators or assigns, at any time, or from time to time during the said term, to remove and convert to his or their own use, any erections, fixtures, or additions to be erected, fixed or made by and at his or their costs, upon or to the said demised premises, for the purposes of agriculture, horticulture, pleasure or ornament, (24) doing as little injury to the demised premises as may be, and making good such injury as shall unavoidably be done. PROVIDED ALSO, that if the said yearly rents hereby reserved, or any part thereof, shall be in arrear (25) for the space of thirty days next after either of the days hereinbefore appointed for payment thereof, or if default shall be made in the observance or performance of any of the covenants herein-before contained, (26) then, in either case, it shall be lawful for the said [*lessor*], his heirs or assigns, to re-enter into the said demised

Proviso enabling lessee to remove agricultural and other erections.

Condition of re-entry for non-payment of rent or non-performance of covenants.

(24) Structures of this nature cannot be removed by the lessee, without express stipulation, see *Buckland* v. *Butterfield*, 2 Brod. & Bingh. 54, 4 B. Moore, 440, where it was held to be waste in the lessee for years of tenant for life to remove a conservatory erected by the lessee and attached to the dwelling-house.

Removal of ornamental structures.

(25) Under a power to lease, requiring the insertion of a condition of re-entry *on* or *for* non-payment of the rent reserved, the tenant may be indulged with a reasonable period, as twenty-one days. *Smith* v. *Doe*, in error, 2 Brod. & Bingh. 473, 5 B. Moore, 332; *Doe* v. *Wilson*, 5 Barn. & Ald. 363.

Condition of re-entry in leases under powers.

(26) The condition of re-entry for breach of any of the covenants, places the lessee, and all persons deriving title under him, in considerable jeopardy, as equity will not relieve against a re-entry for breach of some covenants, e. g. to repair, insure. Yet such a condition is usual, even in building and improving leases. If the demised premises become divided in point of ownership, the title of each proprietor will be dependent on the performance of the covenants by the other proprietors, over whom he cannot of course exercise any control. As to alterations by the tenant in the state of the premises, amounting to waste or not, see 1 Nev. & Man. 11.

Condition of re-entry for breach of covenant.

premises, or any part thereof in the name of the whole, and to repossess and enjoy the same as in his or their former estate, and upon such entry the said term hereby granted shall determine. AND the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said [*lessee*], his executors, administrators and assigns, that it shall be lawful for the said [*lessee*], his executors, administrators and assigns, (he or they paying the said yearly rents hereby reserved, and observing and performing the covenants hereinbefore contained,) peaceably and quietly to hold and enjoy the said hereby demised premises during the said term of —— years, without any eviction, interruption or denial from or by the said [*lessor*] or any person or persons lawfully claiming or to claim through, under, or in trust for him. IN WITNESS, &c.

Covenant by lessor for quiet enjoyment.

Release.

No. 5.

RELEASE *by a Remainder-man in Fee to a Tenant for Life.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*relessor*] of the one part, and [*relessee*] of the other part. WHEREAS, by virtue of indentures of lease and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between, &c. [*names* (27) *of parties to*

Recitals

—of lease and release and recovery, creating tenancy for life, with remainder in fee,

(27) As a general rule, it is better to omit the additions, &c. of the parties to recited deeds, as tending only to encumber and perplex the recital. A conveyance by lease and release is frequently recited after this fashion:—"WHEREAS by indentures of lease and release, the indenture of release being made between, &c. AFTER RECITING that, &c. IT IS WITNESSED that," &c. This, however, is a very inaccurate and slovenly form of recital. The *lease* does not so *recite* or *witness*, &c. If it be necessary to set out the recitals of the release, one or other of the following methods should be adopted:—"WHEREAS, by an indenture of [appointment and] release,

Modes of reciting a conveyance by lease and release.

the release,] and of a common recovery suffered in —— term in the —— year of the reign of his late majesty King George the Third, pursuant to the same indenture of release, the said [*releasee*] is now seised as tenant for his life in possession, without impeachment of waste, of the manor, messuages, farms, lands and hereditaments hereinafter described, with the immediate remainder to the said [*releasor*] in fee simple. AND WHEREAS the said [*releasor*] has contracted with the said [*releasee*] for the absolute sale to him of the remainder in fee simple of the said [*releasor*] in the said hereditaments immediately expectant on the estate for life of the said [*releasee*], in the said manor, messuages, farms, lands and hereditaments, at the price of £——. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of the sum of £——, of lawful British money paid by the said [*releasee*] to the said [*releasor*], at or before the execution of these presents, the receipt of which sum the said [*releasor*] acknowledges, and from the same and every part thereof releases and discharges (28) the said [*releasee*], his heirs, executors, administrators and assigns. The said [*releasor*] Hath bargained, sold, released and confirmed, And by these presents Doth bargain, sell, release and confirm unto the said [*re-*

—of contract for sale of remainder.

TESTATUM.

Consideration.

Operative words.

bearing date, &c. made, &c. and founded [as to the release] upon an indenture of lease bearing date the —— day of the same month, AFTER RECITING, &c. IT IS WITNESSED," &c., or, " WHEREAS by indentures of lease and release, bearing date respectively, &c. the indenture of release being made, &c. (which indenture of release contains recitals showing that, &c.) the hereditaments hereinafter described were conveyed," &c.

(28) This release in the body of the deed estops the vendor *at law* from saying that the purchase money is unpaid, 1 Taunt. 141, 1 B. & C. 304; but a receipt for the purchase-money is always indorsed upon the deed, and until that receipt is signed, the presumption of equity is, that the money remains unpaid. Where, however, payment of the money is recited as an antecedent fact, it is not the practice to indorse a receipt; its absence, therefore, does not impeach the credit due to the recital.

Receipt for consideration.

Parcels.

"All estate" clause.

Habendum.

Covenants by releassor,

—for title,

—for quiet enjoyment,

—for freedom from incumbrances.

lessee], (29) All [*parcels*], Together with all the rights, members and appurtenances thereunto belonging. And also all the estate, right, title and interest of the said [*relessor*], in or to the said hereditaments and premises, and every part thereof in remainder expectant as aforesaid. And also all deeds, muniments and evidences of title in his custody or power relating thereto, To HAVE AND TO HOLD the said hereditaments and premises hereby released, or intended so to be, unto the said [*relessee*], his heirs and assigns for ever, To the intent that the estate for life of the said [*relessee*] may merge in the immediate remainder in fee, and that the said [*relessee*] may be seised of the fee-simple in possession. AND the said [*relessor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*relessee*], his heirs and assigns, that notwithstanding any act, matter or thing done or permitted by the said [*relessor*] to the contrary, he is now seised of, or well entitled to, the inheritance in fee simple in remainder expectant as aforesaid, in the said hereditaments and premises, with their appurtenances, and has in himself good right by these presents to release or assure the same hereditaments and premises unto the said [*relessee*], his heirs and assigns, in manner aforesaid. And also that the said hereditaments and premises, and the rents, issues and profits thereof, shall or may be peaceably and quietly held, received and enjoyed accordingly, without any eviction or interruption from or by the said [*relessor*], or any person or persons having, or rightfully claiming, through, under, or in trust for him: Free and clear, or by the said [*relessor*], his heirs, executors or administrators, effectually kept indemnified from or against all other estates, rights, titles, charges and incumbrances, created or occasioned by the said [*relessor*], or any

Release to tenant for life.

(29) The relessee being already in possession as tenant for life, is of course capable of accepting a release by way of enlargement of his estate, so that a lease for a year would be supererogatory.

person or persons claiming through, under, or in trust for him, or by his act, default, privity or procurement. And lastly, that the said [*relessor*], and every person rightfully claiming through, under, or in trust for him, will, at any time or times, at the request and costs of the said [*relessee*], his heirs or assigns, do and execute every such act, deed, conveyance or assurance for more effectually releasing, confirming or otherwise assuring the said hereditaments and premises, with the appurtenances in manner aforesaid, as by the said [*relessee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed. IN WITNESS, &c.

—and for further assurance.

Receipt for Purchase-Money to be indorsed.

Received on the day of the date of the within-written indenture, from the within-named [*relessee*], the sum of £—— sterling money, being the consideration expressed in the same indenture to be paid by him to me the within-named

[*Signature of Relessor*].

Witness to the above-mentioned payment, and to the signing hereof.

[*Signatures of Witnesses.*]

No. 6.

RELEASE *by a Reversioner in Fee to a Tenant for Years.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*relessor*] of, &c. of the one part, and [*relessee*], of, &c. of the other part, WITNESSETH, that in consideration of the sum of £——, of lawful British money, paid by the said [*relessee*] to the said [*relessor*], on the execution of these presents, in full for the absolute purchase of the fee-simple in possession, free from incumbrances, (except such as are hereinafter excepted,) of the hereditaments hereinafter

Parties.

TESTATUM.

Consideration.

described, the receipt of which sum the said [*relessor*] hereby acknowledges, and from the same sum hereby acquits the said [*relessee*], his heirs, executors, administrators and assigns;

Operative words.

The said [*relessor*] Hath granted, bargained, sold, released and confirmed, and by these presents Doth grant, bargain, sell, release and confirm unto the said [*relessee*] and his heirs,

"Actual possession" clause.

(in his actual possession (30) now being by virtue of a demise made to him by the said [*relessor*], by indenture bearing date the —— day of ——, in the year ——, for a term of twenty-one years from the day of the date of the same indenture, and by force of an entry made by the said [*relessee,*] pursuant to the same indenture,) [*or*, in his actual possession now being, by virtue of a bargain and sale made to him by the said [*relessor*], by indenture dated the day next before the day of the date of these presents, for one year, computed from the day next before the day of the date of the said indenture, and by force of the statute made for transferring uses into possession,]

Parcels.

All, &c. [*parcels*], Together with all the rights, members and appurtenances thereunto belonging, or usually held or enjoyed

All estate, &c.

therewith. And all the estate, interest, right, title, claim and demand of the said [*relessor*], in, to, or upon the said hereditaments and premises or any part thereof.

All deeds, &c.

And all deeds and writings relating to the title of the said [*relessor*] to the said hereditaments and premises, or any part thereof, either alone or together with any other hereditaments of less value now in his

Habendum,

custody, or which he can procure without suit, To HAVE AND TO HOLD the said hereditaments and premises hereby released, or intended so to be, with their appurtenances, unto the said

Operation of release the same, whether relessee be in at the common law or under the statute.

(30) If the relessee is in possession under a common law lease, perfected by entry, then, the release being likewise a common law assurance, the fee will pass by the common law exclusively. But if the relessee is in possession under a lease for a year or for a term of years, operating as a *bargain and sale*, then the conveyance will owe its inception to the Statute of Uses; but still, under the release, the relessee will be finally in at the common law. The precedent in the text is adapted to either case.

[*relessee*] and his heirs, To the use (31) of the said [*relessee*], his heirs and assigns. And the said [*relessor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*relessee*], his heirs and assigns, that notwithstanding any act, matter or thing done or permitted by the said [*relessor*] or his ancestors or devisors, (32) or the ancestors or devisors of or to such ancestors or devisors of or to the said [*relessor*], or any of them to the contrary, (except as hereinafter is mentioned,) the said [*relessor*] is now absolutely seised of the inheritance in fee-simple in possession in the said hereditaments and premises hereby released, or intended so to be, with their appurtenances. And also that notwithstanding any such act, matter or thing as aforesaid, (except as aforesaid,) the said [*relessor*] has good right, by these presents, to release or assure the said hereditaments and premises unto the said [*relessee*] and his heirs, to the use and in manner aforesaid. And also that it shall be lawful for the said [*relessee*], his heirs and assigns, at all times hereafter, peaceably and quietly to hold and enjoy, and to take the rents and profits of the said hereditaments and premises, without any eviction, interruption or denial from or by the said [*relessor*], or any person or persons rightfully claiming through or in trust for him, or through the ancestors or devisors aforesaid, or any of them, (except the respective persons whose estates and interests are herein-

—to relessee in fee.
Covenants —for seisin,
—for right to convey,
—for quiet enjoyment,

(31) It is not necessary to limit the *use* to the purchaser. The nature of the transaction *rebuts* the resulting use. The effect of limiting the use to the relessee is merely negative; he is still *in* at the common law. But if the use were limited to a stranger, it would then have the positive effect of transferring the possession by force of the statute.

Effect of limiting the use to the relessee, —to a stranger.

(32) The vendor is supposed to have derived the estate under wills and descents. In such cases the purchaser is entitled to covenants extending to the acts of the persons from or through whom the title is so derived; but a particular allusion in the covenants to the devisors or ancestors is better avoided, when they would not otherwise appear upon the deed, for a large proportion of the requisitions and objections made upon sales results from indiscreet references to the prior title.

Scope of vendor's covenants, when title is derived under wills and descents.

after excepted in respect only of the same estates or interests,)

—for freedom from incumbrances,

Free and clear, or by the said [*relessor*], his heirs, executors or administrators, kept indemnified against all former or other estates, rights, titles, charges and incumbrances created or occasioned by the said [*relessor*], or the ancestors or devisors aforesaid, or any of them, or any person or person claiming through or in trust for him, or through them, or any of them, or by his, their, or any of their act, default, privity or procurement, (except a lease of the said close hereinbefore mentioned to be called ——, granted by [*lessor*] deceased, the father of the said [*relessor*], by indenture, dated the —— day of ——, in the year ——, to [*lessee*], his executors, administrators and assigns, for a term of twenty-one years from Lady-day then last past, at the yearly rent of £——. And except, &c. [*other incumbrances.*])

—exception of incumbrances,

—for further assurance.

And further, that the said [*relessor*], and every person rightfully claiming through or in trust for him, (except the respective persons whose estates or interests are hereinbefore excepted in respect only of such estates or interests,) will, at the request and costs of the said [*relessee*], his heirs or assigns, make, do and execute such conveyances and assurances, by deed or by matter of record or otherwise, for more effectually assuring the said hereditaments and premises, or any part thereof, to the use and in manner aforesaid, or to any other uses or in any other manner, as by the said [*relessee*], his heirs or assigns, or his or their counsel in the law shall be reasonably advised and required, and as shall be tendered to be made, done, or executed. In Witness, &c.

Surrender.

No. 7.

Surrender *by a Tenant for Life to the Reversioner in Fee.*

This Indenture, made the —— day of ——, in the year ——, Between [*surrenderor*], of, &c. of the one part, and

Parties.

[*surrenderee*], of, &c. of the other part: WHEREAS by an indenture of feoffment duly perfected by livery of seisin, bearing date the —— day of ——, in the year ——, and made between the said [*surrenderee*] of the one part, and the said [*surrenderor*] of the other part, the said [*surrenderee*] leased unto the said [*surrenderor*], the hereditaments hereinafter described, with their appurtenances, To hold unto the said [*surrenderee*] and his assigns for the term of his natural life: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— paid to the said [*surrenderor*] by the said [*surrenderee*], on the execution of these presents, the receipt whereof, as in full for the purchase of the estate for life of the said [*surrenderor*] in the hereditaments hereinafter described, he hereby acknowledges, The said [*surrenderor*] Hath surrendered and yielded up, and by these presents Doth surrender and yield up unto the said [*surrenderee*], All [*parcels*], Together with all the rights, members and appurtenances thereunto belonging or appertaining. And all the estate, right, title, possession, claim, and demand of the said [*surrenderor*], in, to, of or upon the said hereditaments and premises, with their appurtenances, TO THE INTENT (33) that the estate for life of the said [*surrenderor*] in the said hereditaments and premises may merge in the immediate reversion in fee simple now vested in the said [*surrenderee*], and be thereby extinguished. And the said [*surrenderor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*surrenderee*], his heirs and assigns, that the said [*surrenderor*] has not, at any time or times heretofore, done or permitted any act, matter or thing, by which or by means of which the said hereditaments and premises hereby surren-

Recitals —of lease for life. Testatum. Consideration. Operative words. Parcels. All estate, &c. Intent of surrender. Covenant by surrenderor, —that he has not incumbered,

(33) As a surrender destroys the estate upon which it operates, words of limitation, and consequently an habendum, would be out of place. So in a release, operating by way of extinguishment and not of enlargement, the habendum clause is properly omitted, and a clause declaratory of the intent of the instrument may be substituted.

Words of limitation and habendum not proper in a surrender.

dered, or intended so to be, or any part thereof, with their appurtenances, are, is, shall, or may be aliened, incumbered, or prejudicially affected. And also that the said [*surrenderor*], and every person rightfully claiming or to claim any estate, right, title or interest at law or in equity, through, under, or in trust for him, will, at any time or times, at the request and at the costs of the said [*surrenderee*], his heirs or assigns, do and execute every such act, deed, surrender or assurance, for more effectually surrendering, confirming, or otherwise assuring the said estate for life in the said hereditaments and premises unto the said [*surrenderee*], his heirs or assigns, or according to his or their direction as by the said [*surrenderor*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or required, and as shall be tendered to be done or executed. IN WITNESS, &c.

—for further assurance.

No. 8.

SURRENDER *by a Termor for Years to a Reversioner in Fee.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*surrenderor*], of, &c. of the first part, [*late owner of the fee as a directing party*], of, &c. of the second part, and [*surrenderee*], of, &c. of the third part: WHEREAS by an indenture of demise and mortgage, bearing date the —— day of ——, in the year ——, and made between the said [*late owner*] of the one part, and the said [*surrenderor*] of the other part, the said [*late owner*], in consideration of the sum of £——, paid to him by the said [*surrenderor*], did demise unto the said [*surrenderor*], (amongst other hereditaments), All [*parcels*] (of which hereditaments and premises the said [*late owner*] was then seised in fee simple,) with their appurtenances, To Hold unto the said [*surrenderor*], his executors, administrators and assigns, for the term of 500 years, to be computed from the day of the date of the said in-

Parties.

RECITALS —of mortgage for years,

denture, subject to a proviso for redemption, on payment by the said [*late owner*], his heirs, executors, administrators or assigns, unto the said [*surrenderor*], his executors, administrators or assigns, of the sum of £——, with interest for the same, after the rate of £5 per cent. per annum, on the —— day of ——, then next, but in payment whereof default was made. AND WHEREAS the said [*late owner*] lately contracted with the said [*surrenderee*] for the sale to him of the said messuage, lands, hereditaments and premises, free from incumbrances, at the price of £——. AND WHEREAS, in pursuance of the said contract, by indentures of lease and release, the indenture of lease dated the day next before the day of the date of these presents, and the indenture of release being of even date with and executed immediately before the execution of these presents, and made between the said [*late owner*] of the first part, the said [*surrenderee*] of the second part, and [*trustee to prevent dower*] of the third part, the said messuage, lands, hereditaments and premises, have, in consideration of the sum of £——, paid by the said [*surrenderee*] to the said [*late owner*], been assured and limited by the said [*late owner*], To such uses as the said [*surrenderee*] shall by deed appoint, and in default of appointment, To the use of the said [*surrenderee*] and his assigns during his life, without impeachment of waste, with remainder To the use of the said [*trustee*], his executors and administrators, during the life of the said [*surrenderee*], In trust for the said [*surrenderee*] and his assigns, with remainder to the use of the said [*surrenderee*], his heirs and assigns. AND WHEREAS the said sum of £—— is still due to the said [*surrenderor*], upon the security of the said recited indenture of demise and mortgage, but all interest for the same has been paid to him by the said [*late owner*], up to the day of the date of these presents, as the said [*surrenderor*] hereby acknowledges. AND WHEREAS, upon treaty for the said purchase, it was agreed that the said sum of £—— should be paid off out of the said purchase-money, and that the said term of 500 years should be thereupon surren-

—of contract for sale of the fee,

—of conveyance to the purchaser to the uses to prevent dower,

—that the mortgage debt is due, but interest paid up,

—of agreement that term shall be surrendered.

Testatum. Consideration.

dered: Now this Indenture Witnesseth, that in consideration of the sum of £——, of lawful British money, paid by the said [*late owner*] out of the said purchase-money to the said [*surrenderor*] on the execution of these presents, in full satisfaction of all moneys now due to the said [*surrenderor*] on the security of the said recited indenture of demise and mortgage, the receipt of which sum the said [*surrenderor*] hereby acknowledges, and from the same sum, and every part thereof, hereby releases and for ever discharges as well the said [*late owner*] as the said [*surrenderee*], and their respective

Operative words.

heirs, executors, administrators and assigns; The said [*surrenderor*], at the request and by the direction of the said [*late owner*], Hath surrendered and yielded up, And by these presents Doth surrender and yield up unto the said [*surrenderee*],(34) All the said messuage, lands, hereditaments and premises hereinbefore described. And all such other (if any) of the hereditaments comprised in the said recited indenture of demise and mortgage as are also comprised in the said recited indenture of release of even date herewith, Together with the rights, members and appurtenances thereunto belonging; And also all the estate, right, title, term, interest,

All estate, &c.

claim and demand whatsoever, of the said [*surrenderor*], in, to, out of, or upon the said hereditaments and premises, with their appurtenances, To the Intent (35) that by virtue of these presents the residue now unexpired of the said term of

Intent of surrender.

(34) *Suprà*, n. (33).

Merger of term prevented by a mesne legal estate.

(35) The interposition of an estate, either for life, in tail, or for years, will, during its continuance, prevent the merger of the term; but although the instrument could not, under such circumstances, take effect as a surrender, yet it would be operative as an assignment. It is considered hazardous to *surrender* a term where there is reason to suspect mesne incumbrances. But although the cautious practitioner will *assign* the term to a trustee, yet, as no incumbrancer, unarmed with the *legal* estate, could prevail against a *bonâ fide* purchaser without notice, and as the necessary consequence of the existence of a mesne legal *estate*, (though not a mesne legal *lien*,) would be the preservation of the term, it should seem that the danger has been somewhat overrated.

500 years, created by the said recited indenture of demise and mortgage, may merge in the immediate reversion in fee-simple of the said hereditaments and premises now vested in the said [*surrenderee*], and be thereby extinguished. And the said [*surrenderor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*surrenderee*], his heirs and assigns, that the said [*surrenderor*] has not at any time heretofore made, done, or permitted, any act, matter or thing by which, or by means of which, the said hereditaments and premises hereby surrendered, or intended so to be, or any part thereof, are, is, shall or may be impeached, charged, incumbered or prejudicially affected. IN WITNESS, &c.

Covenant by surrenderor that has not incumbered.

No. 9.

SURRENDER *by a Tremor for Years to a Reversioner for Years.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*surrenderor*], of, &c. of the first part, [*owner of the fee*], of, &c. of the second part, and [*surrenderee*], of, &c. of the third part: WHEREAS, by indentures of lease and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between [*names of parties*], and being a settlement in contemplation of the marriage afterwards solemnized between the said [*intended husband, party to the release*], with the said [*intended wife, party to the release*], and by a common recovery suffered by the [*husband*] in —— term, in the —— year of the reign of King George the Third, pursuant to the said indenture of release, All [*parcels*], with their appurtenances, were limited, from and after the solemnization of the said marriage, and from and after certain uses which have determined, To the use of the said [*trustees of term, parties to the release*], their executors, administrators and assigns, for the term of 1000 years, upon certain trusts for raising portions

Parties.

RECITALS —of marriage settlement by lease and release, and recovery, creating a term of 1000 years for raising portions,

and maintenance for the younger children of the said marriage, with divers ulterior limitations. AND WHEREAS the said [*one of the trustees of the term*] died on the —— day of ——, in the year ——, leaving the said [*the other trustee*], his co-trustee, surviving him. AND WHEREAS the said [*the surviving trustee*] died on the —— day of ——, in the year ——. having made and published his last will and testament in writing, bearing date the —— day of ——, in the year ——, and thereby appointed the said [*surrenderor*] to be sole executor thereof, who proved the same on the —— day of ——, in the year ——, in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the trusts of the said term of 1000 years did not arise, inasmuch as there was no younger child of the said marriage, (*or, as the case may be*, the portions and maintenance raisable under the trusts of the said term have been long since fully satisfied, without resorting to an execution of such trusts). AND WHEREAS, by virtue of mesne assurances and of other acts, and ultimately (36) of the last will and testament of [*a mesne owner of the fee*], bearing date the —— day of ——, in the year ——, and proved on the —— day of ——; in the year ——, in the Consistory Court of the Bishop of

—death of one of the trustees of the term,

—death of surviving trustee—his will and probate,

—that the trusts did not arise [*or* were satisfied],

—of the devolution of the fee upon the present owner,

Modes of reciting the creation and deduction of titles to terms.

(36) The practice is to recite the instrument creating the term, and then, instead of deducing the title, step by step, through the intermediate stages, to recite shortly, that by virtue of mesne acts, and ultimately of a particular instrument, the term became vested in A., and that by virtue of other mesne acts, &c. the reversion in fee became vested in B., or became limited to certain uses. When it happens, as in the text, that a second term is created by a subsequent owner, the fee should, by the same process, be brought down, first to such owners, and then, after showing the creation of the term, to the present owner. If the terms to be dealt with are numerous, or the title relating to them is complex, a yet more succinct method may be adopted. Thus, where several terms are assigned or surrendered by a separate deed, upon a purchase of the fee, the deed may begin by reciting the conveyance of even date to the purchaser, setting forth the parcels, and may then recite that the lands are subject (as to all or part, as the case may be,) to the residue of a term of 500 years, which was created by an indenture, dated, &c., and which by virtue of divers mesne acts, and ultimately, &c. became vested, &c. also to another term of 1000 years, created by, &c.

——, the fee-simple in reversion immediately expectant on the said term of 1000 years in the said hereditaments became vested in the said [*owner of the fee*]. AND WHEREAS, by indenture bearing date the —— day of ——, in the year ——, and made between the said [*owner in fee*] and [*wife of owner in fee*], his wife, of the first part, [*surrenderee*] of the second part, and [*trustee to prevent dower*] of the third part, and by a fine levied by the said [*owner in fee and wife*] in —— term, in the —— year of the reign of his present majesty, pursuant to the same indenture, the fee-simple in reversion expectant as aforesaid in the said hereditaments, was limited To the use of the said [*surrenderee*], his executors, administrators and assigns, for the term of 500 years, by way of mortgage, for securing the payment to him or them of the sum of £——, with interest at £5 per cent. per annum, at the time and in manner therein mentioned, but in payment whereof default was made, and subject thereto, To such uses as the said [*owner in fee*] should at any time, or from time to time, by any deed or deeds, appoint, and in default of such appointment, To the use of the said [*owner in fee*] and his assigns during his life, without impeachment of waste, with remainder to the use of [*trustee*], his executors and administrators, during the life of the said [*owner in fee*], upon trust, nevertheless, for the said [*owner in fee*] and his assigns, with remainder to the use of the said [*owner in fee*], his heirs and assigns. AND WHEREAS, by virtue of mesne assignments and other acts, and ultimately of an indenture of assignment bearing date the —— day of ——, in the year ——, and made between [*names of parties*], the said hereditaments became vested in the said [*surrenderee*] for the then residue of the said term of 500 years, upon trust to attend the inheritance, according to the uses of the lastly hereinbefore recited indenture. AND WHEREAS the said [*owner in fee*] is desirous of having the residue of the said term of 1000 years merged. NOW THEREFORE THIS INDENTURE WITNESSETH, that in compliance with such desire, and in consideration of 10*s.* paid by the said [*sur-*

—of deed and fine limiting a term of 500 years to a mortgagee, and the fee to uses to prevent dower in favour of the present owner.

—of the devolution of the term of 500 years upon the surrenderee, as trustee for the present owner.

—of owner's desire to have the term of 1000 years merged.

TESTATUM.

renderee] to the said [*surrenderor*], the receipt whereof is hereby acknowledged, The said [*surrenderor*], by direction of the said [*owner in fee*], Hath surrendered and yielded up, and by these presents Doth surrender and yield up, unto the said [*surrenderee*],(37) All the said messuages, lands, tenements, hereditaments and premises comprised in the said term of 1000 years, created by the first hereinbefore recited indenture, and also comprised in the said reversionary term of 500 years created by the indenture hereinbefore lastly recited, Together with the rights, members and appurtenances thereunto belonging. And all the estate, right, title, term and interest of the said [*surrenderor*] therein and thereto. To THE INTENT that the residue now unexpired of the said term of 1000 years may merge in the residue now unexpired of the said reversionary term of 500 years,(38) and be thereby extinguished. And the said [*surrenderor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*surrenderee*], his executors, administrators and assigns, that the said [*surrenderor*] has not done or permitted any act, matter or thing, by which, or by means of which, the surrender hereinbefore contained may be prevented from taking effect according to the true intent thereof. IN WITNESS, &c.

Operative words.

Intent of surrender.

Covenant by surrenderor that he has not incumbered.

(37) *Suprà*, n. (33).

To whom the surrender of a term should be made.

(38) In order to merge the term, it should be surrendered to the immediate remainder-man or reversioner, whether freeholder or termor, and whether, if termor, his term be of longer or shorter duration than the term to be merged. Suppose the land were limited, first, to A. for 1000 years, secondly, to B. for 500 years, thirdly, to C. for 600 years, and, subject to these terms, to E. in fee, and it were wished to keep on foot the 500 years term, and merge the rest, A. should surrender to B., and C. should surrender to E. Though it is generally desirable to keep on foot the elder term as a protection to the inheritance, yet the title may be so circumstanced as to render it expedient to confide in a term of later creation.

Grant.

No. 10.

GRANT *of a Reversion in Fee expectant on a Term of Years.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*grantor*], of, &c. of the one part, and [*grantee*], of, &c. of the other part, WHEREAS, by indenture of demise and mortgage, bearing date the —— day of ——, in the year ——, and made between the said [*grantor*] of the one part, and [*mortgagee for years*], of the other part, The said [*grantor*], in consideration of the sum of £——, paid to him by the said [*mortgagee*], did demise unto the said [*mortgagee*] the messuage, lands, and hereditaments hereinafter described, with their appurtenances, To hold the same unto the said [*mortgagee*], his executors, administrators, and assigns, for the term of 500 years, subject to a proviso for redemption of the said premises, on payment by the said [*grantor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee for years*], his executors, administrators, or assigns, of the sum of £——, with interest at the rate of £5 per cent. per annum, on the —— day of —— then next, but in payment whereof default was made. AND WHEREAS the said sum of £—— is still due to the said [*mortgagee*], on the security of the said recited indenture, but all interest for the same has been paid up to and inclusive of the day of the date hereof. AND WHEREAS the said [*grantor*] has contracted with the said [*grantees*] for the absolute sale to them of the said messuage, lands, and hereditaments, with the appurtenances, subject to the mortgage made thereof by the said recited indenture, at the price of £——. (39) Now

Parties.

Recitals —of mortgage for years,

—that mortgage debt is due, but interest paid up to date.

—of contract for sale, subject to the mortgage.

(39) The money due upon the mortgage forms part of the consideration upon which the ad valorem duty is imposed by the act 55 Geo. 3, c. 184. It often happens that where the principal and interest due upon a mortgage exceed the value of the property, and the mortgagor has no other means of payment, an arrangement is made for an absolute release

Stamp on release of equity of redemption in satisfaction of a mortgage debt.

TESTATUM. THIS INDENTURE WITNESSETH, that in pursuance of the said

Consideration. contract, and in consideration of the sum of £—— of lawful British money paid by the said [*grantees*] to the said [*grantor*], on the execution of these presents, the receipt whereof the said [*grantor*] acknowledges, and therefrom releases and discharges the said [*grantees*], their heirs, executors, administrators, and assigns, by these presents; and also in consideration of the covenant on the part of the said [*grantees*] hereinafter contained for payment of the said mortgage debt of £——, and the interest henceforth to accrue due for

Operative words. the same, The said [*grantor*] Hath granted and confirmed, and by these presents Doth grant and confirm unto the said

Parcels. [*grantees*], his heirs and assigns, All [*parcels*], Together with all the rights, members, and appurtenances to the said messuage, lands, hereditaments, and premises belonging or

All estate, &c. appertaining. And also all the reversion in fee-simple, equity of redemption, and other estate, right, title, interest, claim, and demand of the said [*grantor*], in, to, out of, or upon the

Deeds, &c. said premises, and every part thereof. And also all deeds, muniments, and evidences of title in his custody or power relating thereto solely or together with other hereditaments

HABENDUM of less value, TO HAVE AND TO HOLD the said messuage,

—to grantees as joint tenants in fee, subject to the mortgage. lands, hereditaments, and premises hereby granted, or intended so to be, unto and to the use of the said [*grantees*], their heirs and assigns for ever, subject to the mortgage

Covenant by grantees to pay mortgage debt and interest, and indemnify grantor. made by the said recited indenture. And the said [*grantees*], for themselves, their heirs, executors, and administrators, hereby jointly covenant, and each of them for himself, his heirs, executors, and administrators, hereby severally covenants with the said [*grantor*], his heirs, executors, and ad-

of the equity of redemption, in consideration simply of a release of the debt; but as the effect of such an arrangement is to convert the mortgagee into a purchaser, the ad valorem duty on conveyances upon sales must be paid in respect of the whole amount of the debt so satisfied; at least there does not appear to be any other safe and effectual mode of accomplishing the object.

ministrators, that the said [*grantees*], their heirs, executors, administrators, or assigns, will or shall pay and discharge the said sum of £—— so due to the said [*mortgagee*] as aforesaid, and all interest henceforth to become due for the same, and will or shall, at all times hereafter, effectually keep indemnified the said [*grantor*], his heirs, executors, and administrators, and his and their estate and effects, against the payment of the same sum and interest, and against all accounts, claims, demands, actions, suits, proceedings, costs, losses, damages, and expenses in respect thereof or in relation thereto. And the said [*grantor*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*grantees*], their heirs and assigns, that notwithstanding any act, matter, or thing done or permitted by the said [*grantor*] to the contrary, the said [*grantor*] has in himself good right by these presents to grant or otherwise assure the said messuage, lands, hereditaments, and premises unto the said [*grantees*], their heirs and assigns, subject as aforesaid, and in manner aforesaid. And also that the same premises shall or may be held, enjoyed, and disposed of accordingly, without any eviction, interruption, or denial from or by the said [*grantor*], or any person or persons rightfully claiming or to claim any estate, right, title, or interest through, under, or in trust for him, Free and clear, or by the said [*grantor*], his heirs, executors, or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances created or occasioned by the said [*grantor*], or any person or persons claiming or to claim through, under, or in trust for him, or by his act, default, privity, or procurement (except the said mortgage). And lastly, that the said [*grantor*], and every person having or rightfully claiming or to claim any estate, right, title, or interest, through, under, or in trust for him, will, at any time or times, at the request and costs of the said [*grantees*], their heirs or assigns, do and execute every such act, deed, conveyance, or assurance for more effectually assuring the

Covenants by grantor,

—for right to convey,

—quiet enjoyment,

—freedom from incumbrances,

—further assurance.

same premises, or any part thereof, with the appurtenances (subject as aforesaid), unto or according to the direction of the said [*grantees*], their heirs or assigns, as they or their heirs or assigns shall reasonably require, and shall tender to be done or executed. IN WITNESS, &c.

No. 11.

GRANT *of a Remainder in Fee, expectant on an Estate for Life.*

Parties. THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*grantor*], of, &c. of the one part, and [*grantees*], of, &c. of the other part.

RECITALS —of will devising to one for life, remainder to the grantor in fee, WHEREAS [*name of devisor*], late of, &c. deceased, by his last will and testament in writing, bearing date the —— day of ——, in the year ——, duly executed and attested for passing freehold estates, and proved on the —— day of ——, in the year ——, in the Prerogative Court of the Archbishop of Canterbury, gave and devised all his messuages, lands, and hereditaments whatsoever and wheresoever, unto [*name of devisor's wife*], his wife, and her assigns, during the term of her natural life, and from and after her decease, unto the said [*grantor*], his heirs and assigns.

—of the testator's seisin. AND WHEREAS the said [*devisor*] was, at the time of making and publishing his said will, and continued thenceforth to the time of his decease, seised of (among other hereditaments) the messuage, close, and hereditaments hereinafter described, for an estate in fee-simple in possession therein.

—of contract for sale of the remainder in fee. AND WHEREAS the said [*grantor*] lately contracted with the said [*grantees*] for the sale to them of the remainder in fee-simple immediately expectant on the determination of the estate for life of the said [*wife*], in the said messuage, close, and hereditaments hereinafter described, with their appurtenances, at the price of £——.

TESTATUM. NOW THIS INDENTURE WITNESSETH, that in pur-

suance of the said contract, and in consideration of the sum of £——, of lawful British money paid by the said [*grantees*] in equal moieties to the said [*grantor*], at or before the execution of these presents, the receipt of which sum the said [*grantor*] hereby acknowledges, and from the same sum, and every part thereof, hereby releases and for ever discharges the said [*grantees*], and each of them, their and each of their heirs, executors, administrators, and assigns, The said [*grantor*], Hath granted and confirmed, and by these presents Doth (40) grant and confirm, unto the said [*grantees*], All that the remainder in fee-simple of the said [*grantor*] immediately expectant on the determination of the estate of the said [*devisor's wife*], for her life, in All [*parcels*], Together with all the rights, members, and appurtenances whatsoever to the same messuage, close, hereditaments, and premises belonging or appertaining, To HAVE AND TO HOLD the said remainder, hereby granted, or intended so to be, unto and to the use of the said [*grantees*], in equal moieties as tenants in common, their respective heirs and assigns for

Consideration.

Operative words.

Parcels.

HABENDUM

—to grantees as tenants in common in fee.

(40) On the sale of a freehold remainder or reversion, it is usual and proper to convey by lease and release, in order that the conveyance may be operative at all events, without regard to the subsistence of the particular estate, and that the owner may be relieved from the necessity of proving such estate to have been subsisting.—At this day, an estate of freehold or inheritance, in remainder or reversion, expectant on an estate in tail, or for life, or for years, or from year to year, or any less period not being merely at will, may pass by a mere deed of grant, without attornment or inrolment.—Those to whom the word *grant* still comes fraught with all the terrors of an implied warranty, (but see 3 & 4 Will. 4, c. 27, s. 36,) may substitute *alien* and *convey*, for the word *grant* is not essential;—nor does the law, indeed, impose the necessity in framing conveyances *inter vivos*, any more than wills, of adhering to any word or form of words, with the exception of the word *heirs*, to create a fee, and the word *exchange* to create a warranty, &c.—*Suprà*, n. (17). Although there cannot be any *seisin in demesne* of a remainder or reversion lying in grant, yet the statute executes uses raised upon the estate of the grantee; for when the statute speaks of one person being *seised* to the use of another, it must be taken to embrace every part owner of the entire fee, in respect of which entire fee the immediate tenant is always seised.

Of conveying remainders, &c. by lease and release,

—by grant.

Covenants by grantor (extending to the acts of himself and his testator,)

ever. And the said [*grantor*], for himself, his heirs, executors, and administrators, hereby covenants with the said [*grantees*] respectively, their respective heirs and assigns, that notwithstanding any act, matter, or thing, done or permitted by the said [*grantor*] or by the said [*devisor*], or any person or persons claiming through or under him to the contrary, the said [*grantor*] is now well entitled to the said remainder in fee-simple hereby granted or intended so to be.

—for title,

—for right to convey,

And also that notwithstanding any such act, matter, or thing as aforesaid, the said [*grantor*] now has in himself good right, by these presents, to grant the same remainder in manner aforesaid.

—for quiet enjoyment,

And also that the same remainder shall or may henceforth be peaceably and quietly held, enjoyed, and disposed of accordingly, without any eviction, interruption or denial whatsoever from or by the said [*grantor*], or any person or persons having or rightfully claiming or to claim any estate, right, title, or interest at law or in equity, through, under, or in trust for him, or through or under the said [*devisor*]; Free and clear, or by the said [*grantor*], his heirs, executors, or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances whatsoever created or occasioned by the said [*grantor*] or the said [*devisor*], or any person or persons claiming or to claim through, under, or in trust for the said [*grantor*], or through or under the said [*devisor*], or by the act, default, privity, or procurement of either of them.

—for freedom from incumbrances,

—for further assurance.

And, lastly, that the said [*grantor*], and every person having or rightfully claiming, or to claim, any estate, right, title, or interest at law or in equity, through, under, or in trust for him, or through or under the said [*testator*], will at any time or times hereafter, at the request and costs of the said [*grantees*] respectively, or their respective heirs or assigns, make, do, and execute every such act, deed, conveyance, or assurance in the law whatsoever, for more effectually or satisfactorily granting, confirming, or otherwise assuring the said remainder in fee-simple, or (if the

said estate for life shall have determined) the fee-simple in possession of the said messuage, close, hereditaments, and premises, with the appurtenances, according to the direction of the said [*grantees*] respectively, their respective heirs or assigns, as by the said [*grantees*] respectively, their respective heirs or assigns, or their respective counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed. IN WITNESS, &c.

Assignment.

No. 12.

ASSIGNMENT *of a Lease for Years.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*assignors*], of, &c. of the first part, [*legatees of deceased assignee*], of, &c. of the second part, and [*assignee*], &c. of the third part. WHEREAS by indenture of lease bearing date the —— day of ——, in the year ——, and made between [*lessor*] of the one part, and [*lessee*] of the other part, the said [*lessor*] did demise unto the said [*lessee*], All [*parcels*] with their appurtenances, To hold unto the said [*lessee*], his executors, administrators and assigns, for the term of —— years, to be computed from the —— day of ——, at the yearly rent of £——, payable in even portions, half-yearly, on the —— day of ——, and the —— day of ——, and subject to the covenants and conditions therein contained on the part of the lessee, his executors, administrators and assigns, to be observed and performed. AND WHEREAS by virtue of mesne assignments and of other acts in the law, and ultimately of an indenture of assignment bearing date the —— day of ——, in the year ——, and made between [*parties*], the said demised premises, with their appurtenances, became vested in the said [*deceased assignee*] for the residue then unexpired of the said term of —— years, subject to the

Parties.

RECITALS —of lease for years,

—of the lessee's will, bequeathing the lease as part of the residue,

said rent, covenants and conditions. And Whereas the said [*deceased assignee*] made and published his last will and testament in writing, bearing date the 5th day of September, 1832, and thereby, after certain pecuniary and specific bequests, which specific bequests did not comprise or affect the said demised premises or any of them, gave and bequeathed the residue of his personal estate unto the said [*legatees*] in equal shares as tenants in common, and appointed the said [*assignors*] executors of his said will. And Whereas the said testator died without having revoked or altered his said recited will, which was proved by the said [*assignors*] on the —— day of ——, in the year ——, in the Prerogative Court of the Archbishop of Canterbury. And Whereas all the debts and the funeral and testamentary expenses of the said testator, and the pecuniary legacies bequeathed by his said will, have been satisfied, and after satisfaction thereof there remains a clear residue of his personal estate, which residue consists in part of the leasehold tenements and premises hereinbefore described. And Whereas the said [*legatees*], as residuary devisees or legatees under the said recited will, with the privity (41) of the said [*assignors*], as executors of

—death of testator and probate of will,

—that his debts, &c. have been paid,

—contract for sale by residuary legatees, with the privity of the executors.

Competency of legatee of chattel real to make a title.

(41) The personal estate of the testator vests primarily in the executors, for the general purposes of administration, and nothing vests in the legatee till the executor assents to the bequest; it follows that even a specific bequest of leaseholds for years is not in itself sufficient to enable the legatee to make a title to a purchaser. In every case, but more especially in the case of a residuary bequest, not merely the assent of the executor, but his concurrence in an actual assignment of the term should be procured. If less than twenty years have elapsed from the death of the testator, a purchaser cannot be advised to rely on a title derived under the legatee alone. On the other hand, a purchaser is generally safe in dealing for a chattel with the personal representative of the deceased owner, without the concurrence or consent of even a specific legatee, unless the disposition made by the personal representative be obviously not conformable to the course prescribed for the administration of assets. Thus, it is the universal practice to deduce the title to a long term of years, whether satisfied or unsatisfied, by pursuing the chain of legal personal representation, without regard to any specific or general bequest in the

—of executor.

the said will, have contracted with the said [*assignee*] for the sale to him of the said leasehold tenements and premises for the residue of the said term of —— years therein, subject to the rent, covenants and conditions aforesaid, at the price of £——. Now THIS INDENTURE WITNESSETH, that in pursuance of the said contract and in consideration of the sum of £—— paid by the said [*assignee*], with the privity of [*assignors*], as such executors as aforesaid, to the said [*legatees*], at or before the execution of these presents, the receipt of which sum the said [*legatees*] hereby acknowledge, and therefrom hereby release and discharge the said [*assignee*], his executors, administrators and assigns, and also in consideration of 10*s.* at the same time paid by the said [*assignee*] to the said [*assignors*], the receipt whereof is hereby acknowledged, The said [*assignors*], as such executors aforesaid, by the direction of the said [*legatees*], Have and each of them Hath assigned and transferred, and by these presents Do and each of them Doth assign and transfer; And the said [*legatees*] Have and every of them Hath aliened, released and confirmed, and by these presents Do and every of them Doth alien, release and confirm unto the said [*assignee*], his executors, administrators and assigns, All the said piece or parcel of ground, messuage or dwelling-house, tenements and premises demised by the said recited indenture of lease of the —— day of ——; Together with the rights, members and appurtenances thereunto belonging; and also all the estate,

Testatum.

Consideration.

Operative words.

Parcels.

wills of the testators through whom the term has devolved. On this subject the following opinion was given by a gentleman of great eminence: "As I understand the law, the term or the mortgage debt is not in the legatees by assent. The debt could not pass to them by assent, and, in my opinion, the term has not passed to them, even if, in point of law, a term, part of a residue of personal estate, can pass by mere assent without assignment. Were a suit for redemption or for foreclosure necessary, the residuary legatees would not be necessary or even proper parties to the suit; and as they would not be necessary parties to a suit, they are not necessary parties to an assignment."

All estate, &c.

right, title, term and interest of the said [*assignors*] and [*legatees*] respectively, and every of them, in or to the same

Deeds, &c.

premises, And also the said recited indenture of lease, and all mesne assignments thereof, and all other documents and evidences in the possession or power of the same parties or any of them relating to the title to the same premises. To

HABENDUM.

HAVE AND TO HOLD the said piece or parcel of ground, mes-

—for the residue of the term, subject to the rent and covenants.

suage or dwelling-house, tenements and premises hereby assigned or intended so to be, with their appurtenances, unto the said [*assignee*], his executors, administrators and assigns, for the residue now unexpired of the said term of —— years, granted by the said recited indenture of lease, subject to the said rent, covenants and conditions therein respectively reserved and contained on the part of the lessee, his executors, administrators or assigns, to be paid, observed

Covenant by the assignors that they have not incumbered.

and performed. And the said [*assignors*] (so far only as concern their own respective acts and defaults) for themselves respectively, and their respective heirs, executors and administrators, hereby severally covenant with the said [*assignee*], his executors, administrators and assigns, that the said [*assignors*] have not nor has either of them, done or permitted any act, matter or thing whereby the said tenements and premises hereby assigned or intended so to be, or any part thereof, are, is, shall or may be incumbered or prejudicially affected.

Covenants by the residuary legatees (restricted to their shares of the purchase money,)

And the said [*legatees*], but so as to charge each of them in damages to the extent only of his share of the said purchase-money of £——, for themselves respectively, and their respective heirs, executors and administrators, hereby severally covenant with the said [*assignee*], his executors, administrators and assigns, that notwithstanding any act, matter or thing done or permitted by the said [*assignors and legatees*], or any

—that the lease is valid,

of them, or by the said [*deceased assignee*] deceased, to the contrary, the said recited lease is a valid and subsisting lease, and not liable to be defeated by re-entry or otherwise; And that notwithstanding any such act, matter or thing as aforesaid, the said [*assignors and legatees*], or some of them now

have in themselves, or one of them now has in himself, good right by these presents to assign or otherwise assure the said premises hereby assigned or intended so to be, with the appurtenances, unto the said [*assignee*], his executors, administrators and assigns, for the residue now unexpired of the said term of —— years in manner aforesaid, according to the true intent of these presents. And further, that it shall be lawful for the said [*assignee*], his executors, administrators and assigns, henceforth during the continuance of the said term of —— years, peaceably and quietly to hold and enjoy the said premises, and to take the rents and profits thereof, subject to the said rent, covenants and conditions, without any eviction or denial from or by the said [*assignors and legatees*], or any of them, or any person or persons rightfully claiming or to claim through, under or in trust for them or any of them, or through or under the said [*deceased assignee*], deceased; Free and clear, or by the said [*legatees*], or some or one of them, their or some or one of their heirs, executors or administrators, kept indemnified from or against all former and other estates, rights, titles, charges, and incumbrances, created or occasioned by the said [*assignors and legatees*], or any of them, or by the said [*deceased assignee*], deceased, or any person or persons, claiming or to claim, through, under or in trust for them, or any of them, or through or under him; And also that the said [*assignors and legatees*] respectively, and every person having or rightfully claiming through, under or in trust for them or any of them, or through or under the said [*deceased assignee*], deceased, (except the person or persons for the time being entitled to the benefit of the said rent, covenants and conditions in respect only of such benefit,) will, at any time or times, at the request and costs of the said [*assignee*], his executors, administrators or assigns, make, do or execute every such act, deed, assignment or assurance for more effectually assuring the said premises hereby assigned or intended so to be, or any part thereof, unto the said [*assignee*], his executors, administrators or assigns, for the residue which

—for right to assign,

—for quiet enjoyment,

—for freedom from incumbrances,

—for further assurance.

shall be then unexpired of the said term of —— years, according to the true intent of these presents, as by the said [*assignee*], his executors, administrators or assigns, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed.

Covenant by assignee to pay rent and perform covenants, and indemnify assignors.

And the said [*assignee*] for himself, his heirs, executors, administrators and assigns, hereby covenants with the said [*assignors*], their executors and administrators, That the said [*assignee*], his executors, administrators or assigns, will henceforth pay the said rent, and observe and perform the said covenants and conditions respectively reserved and contained in the said recited indenture of lease, and will also effectually keep indemnified the said [*assignors*], as such executors as aforesaid, their heirs, executors and administrators, and the heirs, executors and administrators, and the real and personal representatives for the time being of the said [*deceased assignee*], deceased, from all actions, suits and other proceedings, and all costs, losses, damages and expenses by reason of the non-payment of the same rent, or the non-observance or non-performance of the same covenants and conditions or any of them, or by reason of any matter or thing relating thereto.

In witness, &c.

PART II.

Assurances operating under the Statute of Uses.

1. BY TRANSMUTATION OF POSSESSION.

1. *Where the Seisin and the Use are created by the same Instrument.*

No. 13.

SETTLEMENT, *by Feoffment, after Marriage, to Uses in Favour of the Feoffor, his Wife and Children.*

THIS INDENTURE made the —— day of ——, in the year of our Lord, ——, Between [*feoffor*], of, &c. of the one part, and [*feoffees to uses*], of, &c. of the other part, WITNESSETH, that in consideration of the marriage heretofore solemnized between the said [*feoffor*] and [*Christian name,*] his wife, formerly [*maiden name*] spinster, and in consideration of the love and affection which the said [*feoffor*] bears towards his said wife and for divers other good causes and considerations (42) him the said [*feoffor*], hereunto moving, and in

Parties.

Testatum.

(42) As the settlement in this case is supposed to be made after marriage, the words "for divers other," &c. are used for the purpose of letting in the averment of considerations not appearing upon the deed, and of deterring purchasers and mortgagees from dealing with the feoffor on the assumption that the settlement is voluntary within the stat. 27 Eliz. c. 4. As very slight inducements, and even matter extrinsic or matter *ex post facto*, may supply a sufficient consideration to take a settlement out of that statute, the purchase of an estate in defiance of a post-nuptial, or other apparently voluntary settlement, must always be a hazardous speculation.—The general doctrine of equity, in regard to voluntary deeds, was understood to be, that where the transaction was completed by an actual transfer of the property, the court would enforce an execution of the trusts, although the claimants were mere volunteers; but that where it rested in contract, the

Voluntary deeds.

consideration of 10*s.* (43) paid by the said [*feoffees*] to the [*feoffor*] immediately before the execution of these presents,

court would not act without the inducement of at least a meritorious consideration, (18 Ves. 99,) as the moral obligation to provide for a wife and children; and it was an established principle that voluntary conveyances, although void as against purchasers under the above statute, were yet binding on the grantor and his heirs, who could not recall them. According to some recent decisions, however, it should seem that conveyances made by a debtor of his own accord to trustees for the payment of his debts, may be revoked or varied at his pleasure. *Walwyn* v. *Coutts*, 3 Mer. 707; 3 Sim. 14; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1. Unfortunately these decisions do not furnish the practitioner with such distinct and satisfactory tests as enable him to determine in what cases, (with reference to the fact of creditors being parties or not—to dealings or communications, contemporaneous or subsequent, by or with creditors,—and to other circumstances,) the deed, on being repudiated by the maker, may be safely treated as a nullity. The result of the authorities, so far as it can be collected, appears to be, that the trusts of a deed of this kind must be considered as created by the debtor for his own benefit and convenience, and as liable, like directions given to an agent respecting the application of funds belonging to his principal, to be countermanded at pleasure.

Voluntary provisions for payment of debts.

Voluntary restrictions on proprietory rights.

The law of England has provided no means by which a weak or profligate man, not mentally incapacitated, may place himself or be placed by others in a state of tutelage, or may so fetter his dominion as to protect his property from being dissipated by his own facility, infirmity or vice. We have nothing analogous to the interdiction of the Scotch law, which, on the application of the connections of the party, or at the instance of the party himself, conscious of his imbecility, imposes certain restraints on the expenditure of his heritage. Here it is not legally possible for even a donor to create an unalienable trust in favour of the donee (not being a married woman) for personal maintenance, (*supra*, 83); much less can the proprietor create a trust of that nature in favour of himself. Dispositions, with whatever solemnities perfected, by which the owner of property as his own voluntary act, professes to renounce his proprietary rights and to vest them in trustees, with the view of remedying or averting the consequences of his past or future improvidence, are to be considered, in point of legal construction and effect, merely as the wise resolutions of to-day liable to be recalled and annulled by the returning folly of to-morrow. But though the purposes of such dispositions cannot in strictness of law be secured, yet by removing the property, under the sanction of legal forms, from the immediate posses-

the receipt whereof is hereby acknowledged, the said [*feoffor*] Hath given, granted and enfeoffed, and by these presents Doth give, grant, enfeoff and confirm unto the said [*feoffees*] and their heirs, All [*parcels*] (of which said hereditaments the said [*feoffor*] is seised in fee simple in possession), Together with all the rights, members and appurtenances thereunto belonging: And also all the estate, right, title and interest at law or in equity of the said [*feoffor*], in or to the said hereditaments and premises and every part thereof, with their appurtenances, And all deeds and muniments in his possession or power relating thereto, To HAVE AND TO HOLD the said hereditaments and premises hereby granted and enfeoffed or intended so to be, with their appurtenances, unto the said [*feoffees*] and their heirs (44); NEVERTHELESS, To

Operative words.

Parcels.

All estate, &c.

Deeds, &c.

HABENDUM.

To USES, *viz.*

—such uses as feoffor and wife shall by deed appoint,

sion of the owner, they are found capable of interposing a considerable check, and are, therefore, not unfrequently adopted in practice.

(43) It is not necessary to the validity of a conveyance at common law that any consideration should be given or expressed. The only use of the nominal consideration expressed in the text is to render the deed capable of operating as a bargain and sale, if inrolled within six lunar months from the date, pursuant to the stat. 27 Hen. 8, c. 16. But in most cases the intention would be defeated by giving that operation to assurances designed to take effect by transmutation of possession. Thus the precedent in the text, operating as a bargain and sale of the *use*, instead of a feoffment of the land, would vest the legal fee in the persons named as feoffees, and the limitations purporting to be uses would confer only equitable interests. Besides, although the use may be bargained and sold to A. for life, with remainder to B., it cannot be bargained and sold to such persons, and in such manner, as A. shall appoint; so that, for example, the power of appointment which forms part of the ordinary limitations to prevent dower, could not be created by way of bargain and sale.

Nominal considerations.

Conveyances to uses, operating as bargains and sales.

(44) By this conveyance the possession of the land is transferred to the feoffees, to hold to them and their heirs; they have consequently the legal seisin of the fee as joint tenants. The words "and their heirs," are used to denote the quantity of estate (viz. the fee) requisite to supply the uses, as these, in point of legal effect, can only be commensurate with the seisin, so that if the conveyance were made to A. (without words of inheritance) to the use of B. and his heirs, then, as A. would be seised for life only, the use would

Of the seisin to serve uses.

and for such uses, estates, intents and purposes, and in such manner as the said [*feoffor*] and [*christian name*] his wife, at any time or times, by any deed or deeds (either with or without power of revocation and new appointment) to be executed by them, in the presence of and to be attested by one or more witness or witnesses, shall jointly appoint, And in default of such appointment, To the use of the said [*feoffor*] and his assigns during his natural life without impeachment of waste; And after the determination of that estate by any means in his life-time, To the use of the said [*feoffees*] and their heirs during the natural life of the said [*feoffor*], upon trust to support the contingent remainders hereinafter limited, but to permit the said [*feoffor*] and his assigns to receive the rents and profits of the said hereditaments and premises during his natural life, And after the decease of the said [*feoffor*], To the use of the said [*feoffor's wife*] and her assigns during her natural life without impeachment of waste; And after the determination of that estate by any means in her life-time, To the use of the said [*feoffees*] and their heirs

—use of feoffor for life,

—use of trustees during his life to support contingent remainders,

—use of feoffor's wife for life,

—use of trustees during her life,

confer upon B. and his heirs (the heirs taking as special occupants) an estate *pur auter vie*, (i. e. for the life of A.) The habendum is usually made to the feoffees or relessees to uses, and their heirs, and not to them, their heirs *and assigns;* and there seems to be a propriety in this, inasmuch as they have but a momentary title. The attraction of the uses, as *magnetised* (if such an expression be allowable) by the statute, instantly draws the possession from the feoffees or relessees, and executes it in the objects of the limitations. If no use, or only contingent or future uses, were limited, then, in the absence as well of a valuable consideration moving from, or on behalf of the feoffees or relessees, as of an apparent intent to be answered by vesting the estate in them, the use would instantly result to the feoffor or relessor, who would be reinstated in his former ownership, (but see 3 & 4 Will. 4, c. 106, s. 3): so, if the use were limited for particular estates, as for life or in tail only, the use of the ultimate fee would result, (*suprà*, 187).

Resulting uses.

It is a common error to express the grant, or the habendum, as made to the grantees, *and the survivor of them*, &c. thus giving to the conveyance a *contingent* aspect. The word *survivor* is a rock on which the framers both of deeds and wills are very apt to split, as the reports abundantly prove.

Abuse of the word *survivor*.

during the life of the said [*feoffor's wife*], (45) Upon Trust to support the contingent remainders hereinafter limited, yet nevertheless to permit the said [*feoffor's wife*] and her assigns to receive the rents, issues and profits of the said hereditaments and premises during her natural life; And after the decease of the said [*feoffor's wife*], To the use of the child if only one, or the children if more than one, of the said feoffor and [*christian name*] his wife, and if more than one to take in equal shares as tenants in common, and the heirs (46) and assigns of such child or respective children: And in case any of the said children shall die under the age of twenty-one years without leaving issue living at his, her or their death or respective deaths, then as to as well the share hereinbefore limited to each child so dying as the share or shares limited to such child by this executory limitation, To the use of the other, if only one, or the others, if more than one, of the said children, and if more than one to take as aforesaid, and the heirs and assigns of such other or others respectively; but in case there shall be no child of the said [*feoffor*] and [*christian name*] his wife, or no such child who shall attain the age of twenty-one years, or who dying under that age shall leave issue living at his or her death, To the use of the said [*feoffor*], his heirs and assigns for ever. And the said [*feoffor*] for himself, his heirs, executors and administrators, hereby covenants with the said [*feoffees*] and their heirs, that the said hereditaments and premises hereby enfeoffed or intended so to be, shall or may at all times henceforth be peaceably held and enjoyed,

—use of children of feoffor and wife in common in fee,

—with cross executory limitations between them in fee,

—use of feoffor in fee.

Covenants by feoffor, for

—quiet enjoyment according to the limitations,

(45) This second limitation to trustees is not necessary to preserve the contingent remainders, but it protects the wife against the consequences of an inadvertent act of forfeiture.

Limitation to trustees to preserve.

(46) The expense and inconvenience of fines and recoveries brought limitations to children as tenants in common in tail, with cross remainders in tail, into disrepute. In every point of view, limitations in fee, with cross executory limitations, are to be preferred. Indeed, where a small estate is to be distributed among several, the better plan is to impress it with a trust for conversion, and settle the produce.

Tenancy in common in tail, with cross remainders.

and the rents and profits thereof be received according to the limitations hereinbefore contained, without any eviction, interruption or denial from or by the said [*feoffor*], or any person or persons rightfully claiming or to claim through, under or in trust for him, or through or under any of his ancestors: Free and clear or by the said [*feoffor*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, titles and incumbrances created or occasioned by the said [*feoffor*], or any person or persons claiming or to claim through, under or in trust for him, or through or under any of his ancestors, or by his or their or any of their acts, defaults, privity or procurement. And further, that the said [*feoffor*] and every person rightfully claiming or to claim, through, under or in trust for him, or through or under any of his ancestors, will, at any time or times, at the request and costs of any person or persons for the time being entitled to any estate or interest under the limitations aforesaid, make, do and execute every such act, deed, conveyance or assurance for more effectually limiting the said hereditaments and premises or any part of the same, with the appurtenances, to the uses aforesaid, or such of them as shall be subsisting, according to the true intent of these presents, as by the person or persons making such request, or his, her or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be made, done or executed. [*For powers of attorney to deliver and receive seisin, vide p.* 198, suprà.] In Witness, &c.

—freedom from incumbrances,

—further assurance.

*** *For form of Memorandum of livery to be indorsed, vide* p. 200, suprà.

No. 14.

SETTLEMENT, *by* Lease *and* Release, *in contemplation of Marriage, to Uses in Strict Settlement.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*relessor*], of, &c. of the first part, [*intended wife of relessor*], of, &c. of the second part, [*relessees*], of, &c. of the third part, and [*trustees of term for securing jointure, and raising portions*], of, &c. of the fourth part. WHEREAS a marriage has been agreed upon and is intended shortly to be solemnized between the said [*relessor*] and [*intended wife*]. And whereas, upon the treaty for the said intended marriage, it was agreed that the hereditaments hereinafter described, and whereof the said [*relessor*] is seised in fee simple in possession, free from incumbrances, should be settled to the uses, upon the trusts, and with and subject to the powers and provisions hereinafter expressed or contained. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited agreement, and in consideration of the said intended marriage, and also in consideration of 10*s.* paid by the said [*relessees*] to the said [*relessor*], on the execution of these presents, the receipt whereof is hereby acknowledged, The said [*relessor*], with the privity and approbation of the said [*intended wife*], Hath granted, bargained, sold, released and confirmed, and by these presents Doth grant, bargain, sell, release and confirm unto the said [*relessees*] and their heirs (in the actual possession of the said [*relessees*] now being by virtue of a bargain and sale thereof made to them by the said [*relessor*], in consideration of 5*s.*, by indenture bearing date the day next before the day of the date of these presents, for one year, to be computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) All [*parcels*], Together with all the rights, members and appurtenances whatsoever, to the said hereditaments and premises, or any part or parts thereof belonging, or in anywise appertaining.

Parties.

RECITALS —of intended marriage, —of agreement to settle estates, of which the intended husband is seised in fee.

TESTATUM.

Operative words.

Parcels.

All estate, &c.

Deeds, &c.

HABENDUM.

USES, viz.

—use of husband in fee till marriage,

—uses for securing rent-charge to trustees for intended wife's pin-money.

Executory uses.

Classification of uses.

And also all the estate, right, title, interest, claim and demand, at law or in equity, of the said [*relessor*], in, to, out of or upon the said hereditaments and premises, and every part thereof, with their appurtenances. And also all deeds and writings relating to the title of the said [*relessor*] to the said hereditaments and premises, or any part thereof, now in his custody or power. To have and to hold the said manors and other the hereditaments and premises hereby released or otherwise assured, or intended so to be, with their appurtenances, unto the said [*relessees*] and their heirs. Nevertheless, TO THE USES, upon the trusts, and with and subject to the powers and provisions hereinafter expressed or contained, (that is to say,) TO THE USE of the said [*relessor*], his heirs and assigns, until the said intended marriage shall be solemnized, and immediately after the solemnization thereof, To THE USE(47) and intent that the said [*relessees*], their execu-

(47) This limitation, and all the subsequent limitations, are, with reference to the limitation to the use of the relessor in fee till the marriage, shifting or executory uses. The powers of leasing, jointuring, &c. likewise belong to the same comprehensive class of limitations, which, though known under the various appellations of shifting, executory, secondary, springing and future uses, all acknowledge one leading principle. Uses may be shortly divided into vested, contingent, and executory;—first, a vested use confers a legal *estate*, as, when land is limited to the use of A. for life; secondly, a contingent use confers a legal *right*, answering to a contingent remainder at the common law, as, when a limitation to the use of A. for life is followed by a limitation to the use of his unborn children in tail; and, thirdly, an executory use confers also a legal right, answering to an executory devise, as when a limitation to the use of A. in fee is defeasible by a limitation to the use of B., to arise at a future period, or on a given event. This third class may be infinitely subdivided; but, however widely those limitations which depart from the rules of tenure may appear to differ among themselves, it will be found upon examination that the common point of difference, namely, non-conformity to the ancient law, is the essential characteristic of each. They all take effect by divesting, wholly or partially, the vested fee, being neither dependent on the estate, nor destructible by the act of any preceding taker.

tors, administrators and assigns, may, during the term of ninety-nine years, to be computed from the day of the date of these presents, if the said [*intended wife*] and the said [*relessor*], her intended husband, shall both so long live, receive out of the rents and profits of the said hereditaments, a yearly rent charge of £——, of lawful British money, clear of land tax and all other deductions, by equal quarterly portions, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first quarterly portion to be paid on such of the said days as shall happen next after the solemnization of the said intended marriage. ¶ AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rent-charge shall be in arrear for twenty-one days after the same shall become due, it shall be lawful for the said [*relessees*], their executors, administrators or assigns, to enter upon the said hereditaments and distrain for the arrears of the said yearly rent-charge, and the distresses then and there found to dispose of according to law, in order that such arrears and all incidental costs and expenses may be satisfied. AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rent-charge shall be in arrear for thirty days after the same shall become due, it shall be lawful for the said [*relessees*], their executors, administrators or assigns, without any formal demand, to enter into the possession of the same hereditaments, or any part thereof, in the name of the whole, and take the rents and profits thereof, until such arrears and all incidental costs and expenses, together with so much of the said yearly rent-charge as shall grow due during such possession, shall be satisfied, such possession to be without impeachment of waste. ¶ AND it is declared that the said [*relessees*], their executors, administrators and assigns, shall stand possessed of the said yearly rent-charge UPON TRUST to pay the same into the proper hands of the said [*intended wife*], or to any agent or agents authorised by writing under her hand to receive the same, in order that she may enjoy

Power of distress.

Power of entry.

Trusts of pin-money.

the same for her separate use, exempt from the control, debts and engagements of her said intended husband. And it is declared that the receipts of herself, or such agent or agents as aforesaid, shall be discharges to the trustees or trustee for the time being, of the said yearly rent-charge for the payments thereof. And it is further declared, that she shall not have any power to alien or anticipate the same rent-charge. PROVIDED, that if at any time or times, through the wilful default of the said [*intended wife*] and her trustees there shall be more than two years' arrears of the last mentioned yearly rent-charge, then the amount of two years' arrears only shall be recoverable, and the residue of the arrears shall sink into the inheritance of the said hereditaments and premises, and the said trustees, and all other persons, shall be exonerated from liability in respect thereof. And subject to the said yearly rent-charge and the powers and remedies for raising the same, To THE USE of the said [*relessor*] and his assigns during his life, without impeachment of waste.(48) And immediately after the determination in his lifetime of the estate herinbefore limited to him, To the use of the said [*relessees*], their executors and administrators, during the remainder of the natural life of the said [*relessor*], Upon Trust to preserve the contingent remainders hereinafter limited, but to permit the said [*relessor*] and his assigns to receive the rents and profits of the said hereditaments and premises. And immediately after the decease of the said [*relessor*], To THE USE and intent that the said [*intended wife*], if she shall survive the

Not more than two years' arrears of pin-money to be raised.

—use of intended husband for life,

—use of trustees to preserve contingent remainders,

—uses for securing jointure rent-charge to intended wife,

Equitable waste — ornamental timber.

(48) It is *equitable* waste in a tenant for life to cut timber "planted or growing for ornament." On this subject see *Strathmore* v. *Bowes*, 2 Bro. C. C. 88; *Williams* v. *Mucnamara*, 8 Ves. 70; *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 167; *Lord Tamworth* v. *Lord Ferrers*, 6 Ves. 419; *Day* v. *Merry*, 16 Ves. 375; and *Burgess* v. *Lamb*, 16 Ves. 174. It seems desirable, in order to prevent the family quarrels which are too often engendered between tenants for life and remainder-men, that powers more extensive than those which are commonly given should be confided to tenants for life. See n. 49, *infra*.

said [*relessor*], and her assigns may, during the remainder of her life, receive out of the rents and profits of the hereditaments hereby released, or otherwise assured or intended so to be, a yearly rent-charge of £—— of lawful British money, clear of all land-tax and other deductions, on the days appointed for payment of the yearly rent first hereinbefore limited, the first quarterly portion to be paid on such of the same days as shall happen next after the decease of the said [*relessor*], with the like powers and remedies as are given for securing the yearly rent-charge first hereinbefore limited. AND it is declared, that the yearly rent-charge lastly hereinbefore limited, shall be accepted by the said [*intended wife*] for her jointure, and in bar of dower, thirds and freebench, out of the freehold, copyhold and customary tenements and hereditaments of which the said [*relessor*] shall be seised or possessed during the intended coverture. And subject to the yearly rent-charge lastly limited, and to the powers and remedies for securing the same, TO THE USE of the said [*relessees*], their executors, administrators and assigns, for the term of 500 years, to be computed from the day of the date of these presents, without impeachment of waste, Upon the trusts hereinafter declared. And from and immediately after the expiration or other sooner determination of the same term, and in the meantime subject thereto and to the trusts thereof, TO THE USE of the first and every other son (49) successively

—in bar of dower, &c.

—use of trustees for 500 years,

—use of first and other sons of intended marriage in tail male,

(49) Upon treaty for a marriage between a private gentleman, seised in fee of considerable family estates, which had never been the subject of a strict settlement, and a lady possessed of a money portion, proposals were submitted by the lady's advisers for a settlement of the intended husband's estates, providing pin-money and a jointure for the lady, and entailing the estates upon the issue male of the marriage; the husband receiving the portion, but securing its return to the lady's family, on a contingent event, by a charge upon his estates. These proposals elicited from the counsel of the intended husband observations to the following effect:—"Where the gentleman is a landed proprietor, and the lady possessed of a money portion, it is a very usual arrangement for the gentleman to receive the portion, and secure a provision for the lady by way of jointure, or of pin-money and

Terms of settlement where intended husband is a large landed a proprietor, and the lady brings money portion.

of the said [*releasor*] by the said [*intended wife*] in remainder,

jointure, out of his estate. But on such arrangements, it is generally considered, unless the portion be large, that the lady purchases the provision made for her by the absolute relinquishment of her portion. Here the pin-money and jointure proposed to be secured much exceed the value of the lady's fortune, and the lady's friends ought not, therefore, to contemplate the return, in any event, of her fortune to the members of her own family. The proposals extend to a strict settlement by the gentleman upon the first and other sons of the marriage, which settlement, however, it is now understood, is to be limited to a net rental of £—— a year. It will appear from the preceding observations, that where the relative circumstances of the parties are such as in the present case, a strict settlement of the gentleman's estate does not ordinarily enter into the arrangement, which begins and ends with his taking the lady's fortune, and imposing an equivalent pecuniary charge upon his estate. The proposals seldom go further, unless there is hereditary rank or title to be supported, or it is in contemplation to found a family. The former of these circumstances does not exist in this case, and the latter would require a settlement of the bulk of the estates. The policy of such settlements is extremely questionable. It is difficult to refer them, in the absence of both the motives already indicated, to any rational principle. The present possessor has the absolute dominion; his character is known, his right unquestionable. He is asked to reduce himself to a mere tenant for life in favour of an unborn son, of whose character nothing can be predicated, and who, if he can be said to have any right, cannot possibly have a preferable right. At no very distant period, the absolute dominion must be confided to somebody, and why should confidence be reposed in the unborn child rather than the living parent? Such a settlement has no tendency to protect or benefit the father, whose advantage and comfort ought first to be consulted. It does not shield him from the consequences of his own imprudence. On the contrary, if his expenditure should in any instance exceed his income, he, as a mere tenant for life, is in danger of being obliged to borrow upon annuity; a process which, once begun, proceeds generally, and, indeed, almost necessarily, to the complete exhaustion of his life income. But it may be urged that the settlement preserves the inheritance for the son, or—his committee or creditors. The son may be an idiot or a spendthrift. He may be tempted to raise money by *post obit*; to levy a fine,(a) and, by that means, acquire a base fee, in his father's lifetime. If to these not improbable results, we add all the family feuds generated between the tenant for life and remainder-man, in regard to the

Considerations on the policy, &c. of strict settlements.

(a) For the new law, *vide suprà*, 121.

one after another, and the heirs male of the body of each

enjoyment and management by the former of that estate which was once his own, particularly with reference to the cutting of timber, the disadvantages of thus fettering the dominion will appear greatly to preponderate. At best, such a settlement is a speculation; at worst, it is the occasion of distress, profligacy, and domestic discord, ending, not unfrequently, as the Chancery reports bear witness, in obstinate litigation, ruinous alike to the peace and to the property of the family. Sometimes the father effects an arrangement with the eldest son on his coming of age; the son stipulating for an immediate provision in the shape of an annuity, the father for a gross sum to satisfy his creditors, or to portion his younger children, and for a resettlement of the estate. This arrangement, perhaps, is brought about by means, or imposes terms, which, in the eye of equity, render it a fraud upon the son; and here we have another source of litigation. If, however, a strict settlement should be deemed expedient, the objections already urged may be in some degree obviated by reserving to the settlor a power of appointing to any of the sons or issue male of the marriage for any estate or interest; and he should also be invested with ample powers and discretion in regard to leasing, as well for husbandry as for mining purposes, and in regard to timber, buildings, alterations, &c." The power of appointing recommended in the preceding extract, may be in the following form:—

Power of appointing to a son or other issue male.

"To THE USE of all, or of any one or more exclusively, of the sons or other "issue male of the said intended marriage, (such other issue to come into "being in the lifetime of the said [*releasor*],) for such estate or estates, in "such shares, subject to such limitations, and in such manner, in all re"spects, as the said [*releasor*,] by any deed or deeds, revocable or irrevocable, "to be executed by him, in the presence of, and attested by one or more "witness or witnesses, or by his last will and testament, or any testamentary "writing signed and published by him in the presence of, and attested by "one or more witness or witnesses, shall appoint; and in default of appoint"ment, and subject to any partial appointment, To the use," &c. Where such a power is inserted, and portions are provided for younger children, the clauses relating to the portions should of course be so framed, as to exclude an appointee under the power.

Settlements on marriage of wards in Chancery.

The jurisdiction assumed by the Court of Chancery in settling the property of a ward marrying without the Chancellor's approbation, so as not merely to sequestrate the capital in favour of the unborn children, but even to deprive the owner of the power of giving a life interest to the offending party, does appear to be most arbitrary, unjust and impolitic. Surely, it is fit that a testamentary power of appointing a life interest should at least be conceded. Why not, indeed, an absolute testamentary power over the

such son, every elder son and the heirs male of his body

capital? On what principle does the Court proceed in denying this influential power—in stripping the injured party of every atom of that dominion which might be, and ought to be, employed as the means of purchasing peace or rewarding kindness, while an obdurate settlement plants perpetual jealousy and discord? It signifies but little that the property is secured to the *children*, if it be unjustly taken from the parent. To give the capital, against or without the owner's consent, to his children, is not to preserve, but to confiscate the property; it is not protection, but deprivation.—In a late case, *Simson* v. *Jones*, (9 Jarm. Convey. 40,) it was held, upon unanswerable grounds, that a female infant was not bound, even as to personal property, given to her separate use(*a*) by a settlement made under the sanction of the Court, but that on arriving at majority she might repudiate the settlement. And the same authority denies validity in every case to the settlement on marriage of the personal property (for as to real estate the point has long been at rest) of an infant, except as against the adult husband of a female infant in respect of his marital interest.

Popular errors concerning primogeniture and entails.

As this note has touched upon a question of policy, and as some crude notions are abroad on a kindred and popular topic—the practical influence of the law of primogeniture and entails—the reader will, perhaps, excuse the introduction of the following remarks, which were originally appended to an occasional tract, and designed to give a juster direction to public opinion.

"What then is the actual effect of these laws? Suppose the Duke of Northumberland were to die absolutely possessed of landed estates, producing an annual income of 200,000*l*., leaving a son, and several younger children; the law of primogeniture would cast this immense fortune upon the son, in exclusion of the younger branches, IF the duke omitted to make a different disposition of the property by will. Again, suppose the property to be entailed upon the duke and his male issue, the same law, aided by the law of entail, would carry the estates entire to his eldest or only son, IF the duke neglected to pursue a certain form of assurance (a *common recovery*) prescribed by law for defeating the entail.

"Thus, it appears, that the operation of these laws is submitted to the volition of the individual. Now the fact, as every practical man well knows, is, that absolute proprietors of large estates rarely permit them to descend for want of a testamentary disposition; and that entails are commonly destroyed so often as the tenant in tail is in a condition to avail himself of the necessary formalities. The duke, as the absolute owner of large

(*a*) *Sed vide suprà*, 83, n.

taking before every younger son and the heirs male of his

estates, would probably make a will devising them to his family; as the tenant in tail of such estates, he would probably acquire the absolute ownership by means of a common recovery, and then devise or resettle them. In either case, indeed, the bulk of his possessions would probably be secured to the eldest or only son.

"The common course of settlement in great families is this—the peer (or wealthy commoner) in possession, being tenant for life, and the inheritance being entailed upon his eldest son, who is about to marry, the father and son take the proper legal steps for unsettling the estate, and obtaining the absolute dominion over it; they then proceed to resettle the estate, making the father tenant for life, as before, but the son, who was previously tenant in tail, is now reduced in his turn to a tenant for life, and the maintenance of the family dignity is secured for another generation, by settling the inheritance upon the eldest male issue of the intended marriage. By this process, repeated from time to time, the dignity of the aristocracy is chiefly sustained; for a perpetual indestructible entail (except by act of Parliament) is unknown to the laws of England.

"The eldest or only son of the marriage succeeds, not as *heir*—not, therefore, by the law of primogeniture—but as a person specially designated, as a grantee or donee of the estate. It is true that the law of entail, or rather the law which regulates the mode of defeating entails, is productive of this consequence—the son, though of age, cannot, in the lifetime of his father, the tenant in possession, without the father's concurrence, unsettle the estate. Even this position, however, must be received with some qualification, for the son may, by means of a certain form of assurance called a *fine*, alien the estate as against himself and his own issue, even in the lifetime, and contrary to the wishes of the tenant in possession.

"Attending to these facts, can it be maintained, that if partible descents prevailed, if the law of primogeniture did not obtain, there would (to speak the language of the declaimers against primogeniture) be no lordly mansions insulting the peasant's hut, no ancient stems rooted into their patrimonial acres, no proud prescriptive dignitaries of the soil? Look at Kent, where lands descend to all the sons equally, by what is called the tenure of gavelkind. Is that county parcelled out among village squires, and petty yeomen? The abolition of entails would certainly tend in some degree to break up large family possessions, but it would fail to accomplish the downfal of aristocratical influence, which has a deeper and firmer support *in privileges enjoyed by the community at large.*

"The aggrandisement of the heads of families is a consequence of that

—use of first and other sons of intended husband by any future wife in tail male,

body. And on failure of such issue, (50) To THE USE of the first and every other son successively of the said [*relessor*] in

uncontrolled right, which every Englishman possesses, of disposing of his property by gift, contract, or devise, according to his own views, provided he keeps within the limits fixed by the rule against perpetuities, forbidding substitutions calculated to take the property out of commerce for a period exceeding the life or lives of a person or persons in existence, and twenty-one years. So long as this right exists unimpaired, the desire natural to man of amassing wealth, and of perpetuating his own importance in that of his posterity, will necessarily lead to the accumulation of property in the hands of individuals—to the maintenance of an aristocracy of opulent proprietors, who *may* exercise the influence derived from their great possessions injuriously to the general welfare; for wealth is power, and power necessarily supposes the possibility of abuse.

"The true questions, therefore, to be put and considered appear to be these—are the people of England, who have struggled long and hard to obtain the complete power of alienation and testamentary disposition, now prepared to resign it wholly or partially? Would a law abridging that power be received as a boon, or evaded, and in fact repealed, as other unpalatable laws of property have been in times past, by the opposite habits and inclinations of the people? Would industry be stimulated, or be checked, by laws controlling the right of disposition, seeing that wealth is coveted chiefly as it confers power on its possessor, and that it can confer power only in proportion to the amplitude of his dominion over it? *Uses* were hailed as bringing with them the power of testamentary disposition over land,—a power denied by the great feudal lords: but which the legislature and judicature, yielding to the strong desire of mankind for that posthumous dominion, finally established. Does the nation, satiated with liberty, sigh for shackles again—for a perpetuity of distributive succession, and for agrarian and sumptuary laws? Some observations applicable to this subject occur in the First Report of the Real Property Commissioners. They are dictated by sound wisdom and enlighted policy:—'The owner of the soil is we think, invested with exactly the dominion and power of disposition over it required for the public good, and landed property in England is admirably made to answer all the purposes to which it is applicable. A testamentary power is given, which stimulates industry, and encourages accumulation, and while capricious limitations [*i. e.* perpetual entails, &c.] are restrained, property is allowed to be moulded, according to the circumstances and wants of every family.'"

Remainders to collateral branches.

(50) The limitations which follow in the text to the issue of the husband by any after-taken wife, and to the collateral and female branches of the

remainder, one after another, and the heirs male of the body of each such son, every elder son and the heirs male of his body, taking before every younger son and the heirs male of his body. And on failure of such issue, To the use of [*next younger brother of the intended husband,*] and his assigns, during his life, without impeachment of waste, [*remainder to trustees to preserve contingent remainders, with remainders to the first and other sons of the brother in tail male, corresponding with the previous limitations to the intended husband and his issue male, with like remainders to his other brothers, according to seniority, and their sons in tail male.*] And on failure of such issue, To the use of the first and every other daughter successively of the said [*relessor*] by the said [*intended wife,*] in remainder one after another, and the heirs male of the body of each such daughter, every elder daughter and the heirs of her body taking before every younger daughter and the heirs of her body. And on failure of such issue, [*remainder to the first and other daughters of the intended husband by any future wife, remainder to the first and other daughters of the brothers of the intended husband, according to seniority in tail male.*] And on failure of such issue, To the use of the said [*trustees to preserve contingent remainders,*] their executors and administrators, during the life of [*name,*] the wife of [*name and additions,*] who before her said marriage with him was [*maiden name,*] spinster, the eldest sister of the said [*intended husband,*] without impeachment of waste, Upon Trust to preserve the contingent remainders hereinafter limited, and to pay the rents and profits of the said hereditaments into the proper hands of the said [*sister,*] or to such person or persons as she shall by writing under her hand appoint to receive the same, but not by way of anticipation,

—use of brother of the intended husband for life,

—[*remainders to the issue male of the brother, remainders to the other brothers of the intended husband, and their issue male.*]

—use of first and other daughters of the intended marriage in tail male,

[—*remainders to first and other daughters of the intended husband by any future wife in tail male, remainders to daughters of the brothers in tail male,*]

—use of trustees for the life of a married sister of the intended husband for her separate use,

family, are not of ordinary occurrence in *marriage* settlements, but are added in order to afford opportunity for introducing powers of jointuring, portioning, &c., and thus rendering the precedent as comprehensive as possible.

for her separate use, free from marital control, and for which rents and profits the receipts of herself or her appointees shall be sufficient discharges. And immediately after her decease, [*remainders to the first and other sons of the sister in tail male, with like remainders in favour of the other sisters of the intended husband, according to seniority, and their sons in tail male, with remainders to the daughters of the sisters in tail male,*] And on failure of such issue, To the use of the said [*releasor,*] his heirs and assigns for ever. PROVIDED ALWAYS, that every person not having, otherwise than by the unauthorized assumption thereof, (50) the surname and arms hereinafter required to be taken and used, who shall become entitled as beneficial tenant for life or in tail under the limitations herein contained, and not be a married woman, or who shall marry any female becoming so entitled, shall, as to every such tenant, within eighteen calendar months after he or she shall become entitled in possession, if of the age of twenty-one years, or if not, within eighteen calendar months after attaining that age, and as to every such husband, within eighteen calendar months after his wife shall become entitled in possession or become his wife, which ever shall last happen, endeavour to obtain an act of parliament or licence from the crown, authorising such person to assume and use the surname of ——, either alone or in addition to his or her proper surname, (but so that the name of —— shall be the last and principal name,) and the arms of —— either alone or quartered with his or her family arms, and shall, on obtaining such act or licence, assume and thenceforth use the same surname and arms accordingly; and that every person excluded from the aforesaid requisitions by reason of his or her having already the surname and arms aforesaid, shall continue the use of such surname and arms; and that in case of neglect or refusal to comply with all or any of the requisitions of this pro-

[—remainders to first and other sons of the sister in tail male, remainders to the other sisters of the intended husband and their issue male,] C —use of husband in fee.

Clause for taking name and arms.

(50) See *Doe* d. *Luscombe* v. *Yates*, 5 B. & A. 544; *Hawkins* v. *Luscombe*, 2 Swanst. 375.

viso, the estate or estates hereby limited to the person, [*or, as the case may be,* the estate hereby limited to the ancestor of the person,] who, or whose husband, shall be guilty of such neglect or refusal, shall cease, and the subsequent limitations be accelerated, yet so that if all or any of the uses limited to the issue of a tenant for life, whose estate shall so cease, shall be contingent, a limitation to the use of the said [*trustees to preserve contingent remainders*], their executors and administrators for the life of such tenant, shall spring and immediately precede the use or uses from time to time in contingency, upon trust to preserve the same, and to permit, if there be no prior vested estate, the rents and profits to be received and enjoyed by the person or persons for the time being entitled to the first vested remainder: And it is declared, that on the cesser of the estate of a female tenant for life, whose husband shall so neglect or refuse as aforesaid, any appointment or appointments of a rent-charge or rent-charges that she may have made in his favour, in exercise of the power hereinafter given to her, shall be void. And it is declared, that the said term of 500 years is limited to the said [*trustees of term*], their executors, administrators and assigns, Upon trust in the first place for securing to the said [*intended wife*] and her assigns, the yearly rent-charge hereinbefore limited to her for her jointure, and for that purpose when and so often as the same rent-charge shall be in arrear for thirty days after any of the days appointed for payment thereof, out of the rents and profits of the said hereditaments, or by mortgaging, selling, or otherwise disposing of the same hereditaments, or any part thereof, for the last-mentioned term, or any part thereof, or by all or any of the means aforesaid, to raise and satisfy all arrears of the last-mentioned rent-charge, and all incidental costs and expenses. And subject to the trust aforesaid, UPON FURTHER TRUST (51) by the direction in

Trusts of the term of 500 years,

—for securing jointure.

—for raising portions for younger children.

(51) The usual modes of making provision for younger children in strict settlements, appear to be liable to some objections:—1. They limit a term

Of trusts for raising portions.

writing of the said [*relessor*] during his life, and after his decease, of the proper authority of the trustees or trustee, for

1. As to the mode of raising them in the lifetime of the tenant for life.

in reversion, expectant on the death of the father, tenant for life, at the same time that the portions are made raisable in his lifetime with his consent; consequently, in order to effect a loan in his lifetime, he must charge his life interest. A security thus derived partly out of the life estate, and partly out of the term, is complex and inconvenient. To place the term before the life estate might be deemed objectionable, as intercepting the legal dominion of the tenant for life, and, where the wife's jointure is charged on the same lands, as prejudicing her rights; but it seems desirable that a power to accelerate the term should be given to the tenant for life. 2. They adjust the quantum of provision for the younger children by reference to the number of children coming into existence, instead of the number eventually requiring a permanent provision, i. e. marrying or attaining twenty-one. Having indicated a certain sum for a given number of children born, they go on to direct accruer among the children if any die under age, &c.; but as one child might eventually carry off the whole fund, a corrective clause is applied, cutting down the augmented portion to a certain sum. This, of course, adds considerably to the length and complication of the trusts. The number of objects who may require a substantial provision furnishes, it is conceived, the proper criterion for ascertaining the amount of the fund. The expectant share of a child, or, in other words, what that child would take if the children for the time being in existence should in event be the objects, may be available for the purposes of advancement, for which purpose it is not material whether the share is vested, subject to be divested, or purely contingent. In framing trusts for children in money settlements, some conveyancers adopt the contingent form, making the attainment of twenty-one, &c. an integral part of the description of the objects, which renders the survivorship clause unnecessary, since no child dying under twenty-one, &c. is an object of the trust. Under the ordinary clauses a child takes a vested interest on its birth, subject to be divested. Where distinct clauses of accruer are applied, as is sometimes done, to the original and again to the accruing shares, the process is long and intricate. 3. The fund is by the forms in question made payable to an only child, or divisible among all the children, in such shares as the father shall appoint, and for want of appointment equally; instead of being treated as a fund applicable to the benefit of the younger branches of the family, according to the common course of money settlements. When real estates are strictly settled on the elder branch, and there is besides an existing money fund, that fund is commonly settled in trust for all, or any one or more exclusively, of the younger children, grandchildren, or more remote issue, as the parents shall appoint, &c.; and there

2. As to the criterion for ascertaining the quantum of provision to be raised.

3. As to the distribution of the fund when raised.

the time being ~~of the said term~~, by ~~all or any of the means aforesaid~~, to raise, in case one child and no more of the said intended marriage, other than an eldest or only son entitled to the inheritance of the said hereditaments under the limitations hereinbefore contained, shall attain the age of twenty-one years, or be married, the sum of £——, of lawful British money, or in case two children and no more of such marriage, other than eldest or only son entitled as aforesaid, shall attain that age, or be married, the sum of £—— of like money, or in case three or more children of such marriage other than an eldest or only son entitled as aforesaid, shall attain that age or be married, the sum of £—— of like money. And as to the money which shall become raisable under the trust lastly declared, IN TRUST, as a portion or portions, for the child or more remote issue, or all or any one or more of the children or more remote issue of the said intended marriage, (such issue to be born in the lifetime of the said [*relessor*],) other than an eldest or only son or issue, or issue of an eldest or only son entitled as aforesaid, for such interest or interests in such shares, to be vested and paid on such contingencies, or at such period or periods, with such limitations over in favour of any other or others of the objects of this trust, and in such manner, in all respects, as the said [*relessor*], by any deed or deeds, revocable or irrevocable, executed by him in the presence of, and attested by one or more than one witness, or by his last will, or any testamentary writing, signed and published in the presence of, and attested by one or more than one witness, shall appoint. And in default of such appointment, and subject to any partial appointment, IN TRUST, as a portion or portions for the child, if only one, or all the children, if more than one of the said intended marriage, who shall attain the age of twenty-one years, or be married, other than an eldest or only son entitled as aforesaid, such children, if more than one,

Trusts of money raised,

—for younger children and issue as intended husband shall appoint,

—in default of appointment, for younger children equally.

seems to be no reason why a fund, drawn out of the real estate to supply the want of such an existing fund, should be settled in a different manner. The clauses in the text have been framed on the principles here suggested.

Distribution or hotch-pot clause.

to take in equal shares. PROVIDED ALWAYS, that no child taking any portion or portions under any exercise of the aforesaid power of appointment shall participate in the unappointed fund, otherwise than under a further exercise of such power, without bringing the appointed portion or portions into distribution with the other child or children, objects of the trust last aforesaid, and making an allowance for the same. PROVIDED ALSO, that it shall be lawful for the trustees or trustee for the time being, ~~of the said term of 500 years~~, by the direction in writing of the said [*relessor*], during his life, and after his decease in the discretion of such trustees or trustee, to raise in manner aforesaid, and apply in or towards the advancement or preferment in the world or otherwise for the benefit of any child or children or issue entitled to any vested, contingent, or presumptive portion or portions under the trusts aforesaid, any sum or sums not exceeding in the whole one half of his, her, or their portion or respective portions. PROVIDED ALSO, that any money which the said [*relessor*] shall give or advance in his lifetime, for or towards the preferment or establishment in the world of any child or children or issue entitled as last aforesaid, shall go in full or in part satisfaction, according to the amount thereof, of the portion or portions of such child or children or issue, unless the said [*relessor*] shall, by writing under his hand, otherwise declare. PROVIDED ALSO, that the said trustees or trustee shall, after the decease of the said [*relessor*], unless he shall otherwise direct by any exercise of the aforesaid power of appointment, raise out of the rents and profits of the said hereditaments, and apply in or towards the maintenance and education, or otherwise for the benefit of any child or children or issue entitled as last aforesaid, an annual sum or annual sums equal to interest after the rate of £—— per cent. per annum on his, her, or their portion or respective portions. PROVIDED ALSO, that in order to facilitate the raising in the lifetime of the said [*relessor*] and [*intended wife*], or of the survivor of them, of any sum or sums of money pursuant to the trusts and provisions aforesaid, it shall be lawful for them, him, or her, by any deed or deeds, executed in the

Advancement clause.

Sums advanced to go in part discharge of portions.

Maintenance clause.

Power to accelerate term for raising money in lifetime of husband and wife or survivor.

presence of and attested by one or more than one witness, to accelerate the said term of 500 years, and give effect thereto in the same order as if the limitation thereof had immediately preceded the use limited to the said [*relessor*] for his life, so far only as concerns the hereditaments to be sold, mortgaged, or otherwise disposed of for raising such sum or sums.(52) PROVIDED ALSO, that the trustees or trustee for the time being of the said term of 500 years, shall, but subject and without prejudice to the trusts thereof, permit the person or persons for the time being entitled in remainder or reversion immediately expectant thereon, to hold and enjoy the said hereditaments and receive the rents and profits thereof. PROVIDED ALSO, that in case the trusts of the said term of 500 years shall not arise, or shall become unnecessary or incapable of effect, or shall arise and be performed or satisfied, then the same term (but without prejudice to any disposition made thereof for any of the purposes aforesaid) shall cease. PROVIDED NEVERTHELESS, that notwithstanding any of the uses hereinbefore limited, it shall be lawful for the said [*intended husband*], by any deed or deeds, executed by him in the presence of and attested by one or more than one witness, to charge the said hereditaments, or any part or parts thereof, with the payment to any person or persons of any sum or sums of money not exceeding in the whole the sum of £——, with interest for the same after the rate of £5 per cent. per annum, and to appoint the hereditaments to be so charged to the same or any other person or persons for any term or terms of years, without impeachment of waste, subject to a proviso for cesser, on payment by the person or persons for the time being entitled in remainder or reversion expectant on such term or terms, of the sum or sums and interest so charged as aforesaid, at the time or times to be therein appointed for payment thereof. PROVIDED ALSO, that it shall be

Ultimate trust for reversioners.

Proviso for cesser of term.

Power to intended husband to charge with a gross sum.

(52) This clause prevents the necessity of resorting to the awkward expedient of a demise by the husband as tenant for life, and avoids the difficulty that by exonerating part of the land from the wife's rent-charge its total extinction is risked.

Power of accelerating term for raising portions.

Power to intended husband to appoint an additional jointure to intended wife.

lawful for the said [*intended husband*], by any deed or deeds, revocable or irrevocable, executed by him in the presence of and attested by one or more than one witness, or by his last will, or any testamentary writing, signed and published in the presence of and attested by one or more than one witness, to appoint unto or in favour of the said [*intended wife*], his intended wife, a yearly rent-charge or rent-charges, not exceeding in the whole the clear yearly sum of £——, in augmentation of the yearly rent-charge hereinbefore limited to her for her jointure, to be issuing out of the said hereditaments, and to commence from the decease of the said [*intended husband*], and to be payable during the life of the said [*intended wife*], on the days and in manner appointed for payment of the yearly rent-charge hereinbefore limited to her. And it is declared that the trusts, powers and remedies given for securing the yearly rent-charge hereinbefore limited to her, shall extend to secure such additional rent-charge or rent-charges.

Power to tenants for life to appoint jointures.

PROVIDED ALSO, that it shall be lawful for every male tenant for life under the limitations hereinbefore contained, whether entitled in possession or not,(53) either in contemplation of marriage or after marriage (other than the said [*intended husband*] in respect only of his said intended wife) by any deed or deeds, revocable or irrevocable, executed by him in the

Power to Jointure.

(53) The validity of the appointment should not be made to depend either on the tenant for life being in possession at the time, or on his eventually coming into possession. Suppose A., tenant for life, remainder to his issue in tail, remainder to B. for life, remainder to his issue in tail, remainder to C.;—B. appoints a jointure, living A., who afterwards dies without issue, living B. The first requisite would render the appointment bad, though B. might now make a valid appointment. Again, B., living A., appoints and afterwards dies, living A., who dies without issue, and the estate devolves upon the issue of B. or upon those in remainder. Here, under either requisite, the appointment would be incurably bad, yet the estate has passed by B., and in its passage the jointure ought to have been drawn out. The power should be exercisable before the estate reaches that point; its exercise effectual only if the estate should reach it before the appointed interest is spent.

presence of and attested by one or more than one witness, or by his last will, or any testamentary writing, signed and published in the presence of and attested by one or more than one witness, to appoint to or in favour of any and every woman whom he shall marry, or has or shall have married, in the event of her surviving him, a yearly rent-charge or yearly rent-charges not exceeding in the whole the clear yearly sum of £——, to be issuing out of the said hereditaments, or any part thereof, and to be payable during the natural life of such woman for her jointure, and in bar of dower, thirds and free-bench, on such days and in such manner as the appointor shall direct, with the usual powers of distress and entry, and perception of rents for securing the payment thereof; and by the same deed or deeds to limit the hereditaments to be so charged as last aforesaid, to a trustee or trustees for any term or terms of years, to commence from the decease of such tenant for life, without impeachment of waste, upon the usual trusts for securing the appointed yearly rent-charge, and subject to the usual proviso for cesser: But no rent-charge to be so appointed shall take effect in possession unless the appointer shall be, or shall afterwards become entitled in possession to the said hereditaments, or would, if living, have been so entitled under the limitations hereinbefore contained: And further, that if the said hereditaments would, by reason of the exercise of the powers of jointuring hereinbefore contained, or either of them, be liable at any time to the payment of a larger yearly sum in the whole than £——, including the jointure rent-charge hereinbefore limited, then the posterior charge shall not take effect, or shall only partially take effect in possession, until the amount of the previous charge shall cease or be diminished so as to reduce the existing annual burthen to the sum lastly specified. PROVIDED ALSO, that it shall be lawful for every female tenant for life under the limitations hereinbefore contained, whether entitled in possession or not, either in contemplation of marriage or after marriage, by any deed or deeds, revocable or irrevocable, executed by

Power to female tenants for life to appoint life estates, or rent-charges to husbands.

her in the the presence of and attested by one or more than one witness, or by her last will, or any testamentary writing, signed and published in the presence of and attested by one or more than one witness, to appoint to or in favour of any husband whom she shall marry, or has or shall have married, in the event of his surviving her, the said hereditaments or any part thereof for his life, or any yearly rent-charge, to be issuing out of the said hereditaments or any part thereof, and to be payable during his life, with such powers and remedies and such terms of years for securing the same rent-charge as are authorised to be created by the power of appointing jointures hereinbefore contained: But no estate or yearly rent-charge to be so appointed shall take effect in possession unless the appointor shall be or shall afterwards become entitled in possession to the said hereditaments, or would, if living, have been so entitled under the limitations hereinbefore contained; and further, that if the said hereditaments would, under the power lastly hereinbefore contained, be liable, &c. [*as in power to appoint jointures, suprà*, 263.]

Power to tenants for life to appoint portions for younger children.

PROVIDED ALSO, that it shall be lawful for every tenant for life under the limitations hereinbefore contained, exclusive of the power hereinbefore limited of appointing to husbands, whether entitled in possession or not, by any deed or deeds, revocable or irrevocable, executed by him or her in the presence of and attested by one or more than one witness, or by his or her last will or any testamentary writing, signed and published in the presence of and attested by one or more than one witness, to appoint (but without prejudice to any rent-charge or estate, limited or to be limited to the wife or husband of any prior tenant for life or to the wife or husband of the appointor), the said hereditaments or any part thereof, to any trustee or trustees for any term of years without impeachment of waste, to commence from the decease of the tenant for life so appointing, upon the like trusts and with and under the like powers and provisions for raising and providing the like portions, advancement and maintenance, for

the child or children and issue of the tenant for life so appointing, other than an eldest or only son or other issue male entitled to the inheritance of the said hereditaments under the limitations aforesaid, and exclusive of the child or children and issue of the said [*intended husband*] by the said [*intended wife*], his intended wife, as are declared of the said term of 500 years, (54) in favour of the last-mentioned child or children and issue. But none of the trusts or purposes of any term to be appointed as last aforesaid shall be capable of effect unless the appointor or his or her issue shall be or shall afterwards become entitled in possession to the said hereditaments under the said limitations; And further, that if the said hereditaments would, by reason of the exercise of the power of portioning lastly hereinbefore contained be liable at any one time to the payment of a larger gross sum in the whole than £——, or a larger yearly sum in the whole than £——, (including the moneys raisable under the trusts of the said term of 500 years,) the posterior charge shall not take effect or shall only partially take effect in possession, until the amount of the previous charge shall cease or be diminished so as to reduce the existing burthen to the sum lastly specified. PROVIDED ALWAYS, that it shall be lawful for every tenant for life and adult tenant in tail, entitled in possession, under the limitations hereinbefore contained, inclusive of the

Power to lease.

(54) Where no term is limited by the settlement for raising portions, and where, consequently, the trusts of the term to be created under the power cannot be declared by way of reference, trusts and provisions, similar to those declared of the term of 500 years, *suprà*, p. 257, may be engrafted on the power, substituting "the tenant for life so appointing," for "the intended husband." If the trusts and provisions are set forth pretty fully, the donee of the power will be enabled to execute it with more facility and certainty. As little as possible should be left to construction. So, where articles of settlement are entered into, the limitations and provisions should be formally and fully expressed, and the settlement be made by a short indorsement upon the articles; otherwise, to the uncertainty of heads or minutes, will be added the prolixity attending their repetition by way of recital in the settlement, and their expansion into formal clauses.

Powers to portion younger children.

Articles of settlement, mode of framing.

power hereinbefore limited of appointing to husbands, and for the guardian or guardians of every infant tenant in tail so entitled, by indenture, executed by him ~~or her~~ in the presence of and attested by one or more than one witness, to appoint by way of lease all or any part of the said hereditaments or any part thereof, (except the said manor of ——, and the said advowson of the church of —— aforesaid, and the said capital mansion-house with the park, gardens, pleasure-grounds and appurtenances thereto belonging,) for any term of years not exceeding twenty-one years in possession from the making [or from any period not exceeding six calendar months next after the making] of such lease, so as the best yearly rent, payable half-yearly or quarterly, be reserved, and no fine or premium be taken, and so as the lease contain covenants for payment of the rent and taxes and for repairing and keeping in repair the premises demised, and, if the lease comprise any buildings, for insuring the same against loss by fire, with such other covenants as the lessor shall think reasonable, and also a privoso for re-entry (55) on non-payment of the rent for a period not exceeding ~~twenty-one~~ 28 days after the same shall become due or on breach of any of the covenants, and so as the lessee execute a counterpart. PROVIDED ALSO that it shall be lawful for the said [*trustees to preserve contingent remainders,*] and the survivor of them, his executors and admi-

Power to sell and exchange, to enfranchise copyholds, and to make partition.

Clause restraining re-entry for breach of covenants in a lease.

(55) See notes (25), and (26), *supra*. With reference to the subject of the latter note, the following proviso, extracted from a private act of parliament, directing its insertion in building leases, to be granted under the powers of the act, seems to have been dictated by a sense of the hardship of an unqualified condition of re-entry on breach of any of the covenants. "Provided nevertheless, that no breach of any of the covenants hereinbefore contained (except the covenant for payment of rent) shall occasion any forfeiture of this lease, or of the term hereby granted, or give any right of re-entry, unless or until judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall remain unpaid for the space of six calendar months after judgment shall have been obtained in such action."

nistrators, with the consent in writing of the tenant for life or adult tenant in tail for the time being entitled in possession under the limitations hereinbefore contained, exclusive of the power hereinbefore limited of appointing to husbands, to sell the said hereditaments or any part thereof, together or in parcels, by public sale or private contract, for the best price in money, or to exchange the said hereditaments or any part thereof for other hereditaments or tenements of the description hereinafter authorised to be purchased, ~~or to enfranchise~~ for the best price in money, any copyhold ~~tenement or~~ tenements within the said manor of ——, ~~or to make partition of~~ any hereditaments whereof an undivided part ~~or parts~~ is or are hereby settled, with liberty ~~to give or accept~~ any money for ~~equality of exchange~~ or partition, and thereupon by deed, executed by the said [*same trustees*], or the survivor of them, his executors or administrators, in the presence of and attested by one or more than one witness, to make such revocation of the then subsisting uses of this settlement, and such appointment of new uses, as shall be proper for giving effect to the sale, exchange, ~~enfranchisement or partition~~, but so as not to disturb any lease made in exercise of the power of leasing hereinbefore contained (56). And it is declared that the said

(56) Where the trustees of a power of sale sell the settled estate subject to a lease granted under a power of leasing, it is material to ascertain that the lease is conformable to the power of leasing. In a case which occurred in practice, the purchaser's counsel objected that a contract by the trustees of a power of sale in a settlement to sell the estate, subject, as to part of the land, to a lease granted by the tenant for life, of which lease the validity, as an execution of the power of leasing, was at least doubtful, could not be supported, "inasmuch as they (the trustees) would sell another interest "than that which they were authorised to sell, for they would sell the "estate as a reversion in fee expectant on the lease, instead of selling the "fee simple in possession, treating the lease as a nullity." The point was submitted to a conveyancer of great eminence, who gave the following opinion:—"Under the circumstances the trustees cannot, in my opinion, "make a marketable title. They have no right to sell the reversion, as "subject to a lease, on the supposition that the lease is not valid, and by

Sale by trustees of a power of sale subject to a lease, not warranted by a power of leasing.

Money to arise from sales, &c. to be laid out in the purchase of estates to be settled to the like uses.

[*the same trustees*] or the survivor of them, his executors or administrators, shall apply the money to be received from any such sale, exchange, ~~enfranchisement or partition~~ as aforesaid, in discharging the incumbrances (if any) which shall then affect the settled hereditaments, and shall lay out the money so received, and not so applied, in the purchase of the fee-simple in possession of freehold hereditaments situate ~~in England or Wales, or in the purchase of copyhold or customary~~ or leasehold tenements, convenient to be held with the freehold hereditaments comprised in, or to be acquired under this settlement; such leasehold tenements to be held under a renewable lease or leases for life or for years, or for an absolute unexpired term of at least 100 years; And shall limit or cause to be limited, as well the hereditaments and tenements so to be purchased, as the hereditaments and tenements to be acquired by means of any such exchange ~~or partition~~ as aforesaid, to the then subsisting uses of this settlement, or as near thereto as may be; But the chattels real to be so settled shall not vest absolutely in any tenant in tail of the freehold hereditaments who shall die under the age of twenty-one years without leaving issue male living at his or her decease; And further the fines and expenses incident to the renewal of the leases of any renewable leaseholds purchased or acquired as aforesaid, shall be defrayed out of the rents and profits thereof: And it is declared that the said [*same trustees*], or the survivor of them, his executors or administrators, shall,

Chattels real not to vest absolutely in tenant in tail dying under age without leaving issue male.

Money to be laid out in the funds, &c. till invested in land.

" that means sacrifice the interest of the persons on whose behalf they are " to exercise the power of sale. By the *res gestæ* it will appear that the " mill, &c. were sold as a reversion expectant on the lease, that is, for a " price computed at the full value, after the lease, and by a value computed " from the amount of the rent during the currency of the lease. Now this " ought not to be done in those cases in which the lease is not binding on " the persons in remainder and reversion. The difficulty is that the price, " as fixed, is inadequate on the supposition that the lease is invalid. No " apportionment of the price can relieve the case from its difficulty." The title was rejected.

until the same money shall be so laid out as aforesaid, invest the same in or upon the public stocks or funds of the United Kingdom, or upon real securities in England or Wales, in their or his names or name, and be at liberty to vary the investment from time to time for any other of the like nature; And it is declared that the annual income of such investment shall follow the destination of the rents of the hereditaments directed to be purchased therewith: But no such purchase or ~~investment~~ as aforesaid shall be made while any tenant for life or adult tenant in tail shall be entitled in possession under the limitations herein contained, exclusive as aforesaid, without his or her previous consent in writing. PROVIDED ALSO, that the receipts in writing of the respective trustees for the time being acting in the execution of the respective trusts hereinbefore created, shall be discharges for all moneys to be received by them respectively pursuant to such trusts, and shall exonerate the person or persons paying the same from all liability in respect of the application thereof. PROVIDED ALSO, that it shall be lawful for the said [*relessor*] and [*intended wife*] and the survivor of them, and after the decease of such survivor, for the trustees or trustee for the time being of the respective trusts aforesaid, and for the executors or administrators of any surviving trustee of such respective trusts, from time to time, as often as there may be occasion, by deed executed in the presence of and attested by one or more than one witness, to appoint any person or persons to supply the place of any present or future trustee or trustees of the said trusts respectively who may die or become unwilling or unable to act in the execution of such trusts respectively, before the same shall be fully performed, each class of trustees appointing to vacancies in its own body: And it is declared that upon every such appointment the respective trust estates and funds shall be conveyed, assigned and transferred, so as to vest the same jointly in any new and old trustees, or solely in the new trustees, as occasion shall re-

No purchase to be made without consent, if tenant for life or in tail of age.

Receipts of trustees to be discharges.

Provision for the appointment of trustees.

quire, and every new trustee shall succeed to the powers and duties of the trustee in whose place he shall be appointed.

Indemnity of trustees.

PROVIDED ALSO that the trustees hereby appointed and to be appointed as aforesaid, respectively, and their respective executors or administrators, shall not be answerable for the acts or receipts of each other, or for any loss or damage which may happen in the execution of the aforesaid trusts respectively without their own respective default, and shall be at liberty to deduct and retain, out of the trust moneys which shall come to their hands, all costs and expenses which they may incur or sustain in the execution of the trusts reposed in them respectively.

Covenants by intended husband,

And the said [*relessor*] for himself, his heirs, executors and administrators, hereby covenants with the said [*relessees to uses*] and their heirs, that notwithstanding any act, matter or thing done or permitted by the said [*relessor*] or any of his ancestors to the contrary, the said [*relessor*] is well entitled by these presents to assure and limit the said hereditaments hereby released or otherwise assured or intended so to be, to the uses and in manner aforesaid;

—that he has right to convey,

—for quiet enjoyment,

And that the said hereditaments shall, from and after the solemnization of the said intended marriage be held and enjoyed, and the rents and profits thereof received accordingly, without any eviction, interruption or denial from or by the said [*relessor*], or any person or persons rightfully claiming or to claim under or in trust for him or any of his ancestors;

—for freedom from incumbrances,

Free from, or by the said [*relessor*], his heirs, executors or administrators, kept indemnified against, all former or other estates, rights, titles, charges and incumbrances created or occasioned by the said [*relessor*] or any of his ancestors, or any person or persons claiming under or in trust for him or them or any of them.

—for further assurance.

AND ALSO, that the said [*relessor*] and every person rightfully claiming under or in trust for him or any of his ancestors will, on every request and at the costs of any person or persons interested under the limitations aforesaid, do or execute every such act, deed or assurance, for

more effectually assuring the said hereditaments, or any part thereof, to the then subsisting uses and according to the true intent of these presents, as by the person or persons respectively making such request, or his, her or their counsel in the law shall be reasonably advised and required, and as shall be tendered to be done or executed. IN WITNESS, &c.

2. *Where the Seisin and the Use are created by distinct Instruments.* (57)

Appointment.

No. 15.

APPOINTMENT, *by the joint Donees of a Power contemplating Specific Objects, to a Child in Fee.*

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, [*husband*], of, &c. and [*christian name*], his wife, send greeting. WHEREAS by indentures of lease and release, bearing date RECITALS,

(57) This distribution of assurances which raise uses by transmutation of possession is not founded upon any substantial difference in their nature. Though the student would probably feel some difficulty at first in admitting an *appointment* to be an assurance under which a use arises by transmutation of possession, yet, when it is considered that the *power* itself is really an *executory use*, deriving its legal existence from the original conveyance to uses, and that the appointment merely ascertains the object or direction of such use, it will be apparent, not only that the appointment owes its efficacy to the seisin raised by transmutation of possession, but that in legal contemplation, the appointee is *in* of a use limited by the very assurance which created the seisin. It is, indeed, a settled principle that the use created by the execution of a power is to be considered, in point of construction and effect, (but not in point of time, or, in other words, only from the period of the execution of the power,) as contained in the instrument creating the power, or, more correctly speaking, in the assurance creating the seisin to serve the uses to be raised under the power—for that

Condition of uses limited by appointment, with reference to the assurance creating the seisin.

—of marriage settlement, containing a power enabling the husband and wife to appoint to all or any one or more of their children.

respectively the —— and —— days of ——, in the year ——, The indenture of release made between [*husband*] of the first part, the said [*christian name*], the wife of the said [*husband*], by her then name and description of [*maiden name*], spinster, of the second part, and [*trustees of settlement*], of the third part, being a settlement in contemplation of the marriage of the said [*husband*] and [*christian name*], his wife, divers manors, messuages, lands, tenements and hereditaments, situate at ——, in the county of ——, therein described, with their apputenances, were limited, from and

seisin is the common source of all the uses. The power itself may be created by an instrument distinct from the assurance which raises the seisin, as when land is conveyed by lease and release to A., to such uses as B. shall by deed appoint, and then B., by a subsequent deed, appoints to such uses as C. shall by deed appoint. Now, if C. appoints to the use of E., the appointee (E.) will be regarded, from the time of such appointment, as the taker of a use under the conveyance to A. It sometimes happened that no use whatever was, or could be, limited by the assurance which created the seisin, as where the seisin was created by fine or recovery, the uses were necessarily declared by another instrument. So the seisin may be created by feoffment, or by lease and release, and the uses be wholly declared by a separate instrument; for such declaration would negative the resulting use. In all these instances, the assurance creating the seisin, and the instrument limiting the use, are considered as standing in the intimate relation to each other of cause and effect. Enough has been said to guard the student against inferring, from the distribution which it has been thought convenient to adopt of the precedents in the text, that an appointment is a distinct species of assurance adapted to originate uses, instead of being, what it truly is, the application or modification of a use which owes its inception to a previous assurance.

Appendancy of powers.

Some remarks have been made in a former note (22, *supra*) on the classification of powers, with reference more particularly to powers appendant, as, for example, a power of leasing given to a tenant for life. Now, such a power is nothing but an executory use; in other words, the fee is conveyed to the use (among other uses) of such person as the tenant for life shall nominate to be the lessee for a certain term of years upon certain conditions, and this executory use is served out of the seisin of the fee, in precedence of the estate of the tenant for life, to whose estate it is nevertheless said (with what propriety is at least questionable) to be *appendant*.

after the solemnization of the said marriage, To the use of the said [*husband*], and his assigns for his life, without impeachment of waste, with remainder to the use of the said [*trustees*], and their heirs, during the life of the said [*husband*], upon trust to preserve the contingent remainders thereinafter limited, and after the decease of the said [*husband*], to certain uses for securing to the said [*christian name*], the wife of the said [*husband*], a yearly rent-charge of £—— for her life for her jointure, and subject thereto, To the use of all or any one or more of the children or more remote issue of the said marriage, (such issue to be born in the lifetime of the said [*husband*] and [*christian name*], his wife, or one of them,) for such estate or estates, in such shares, subject to such restrictions and limitations and in such manner as the said [*husband*] and [*christian name*], his wife, by any deed or deeds, revocable or irrevocable, to be executed by them in the presence of and to be attested by two or more witnesses, should direct, limit, or appoint, And in default of such direction, limitation or appointment, to certain ulterior uses. AND WHEREAS the said marriage was solemnized in the parish church of ——, on the —— day of ——, in the year of ——. —that the marriage was solemnised,

And whereas there has been issue of the said marriage an eldest son, (namely) [*name of son*], who was baptized at ——, on the —— day of ——, in the year ——, and several younger children. —that there is issue, an eldest son and younger children,

AND WHEREAS the said [*husband*] and [*christian name*], his wife, have not exercised the aforesaid power of appointment given to them by the said recited indentures: —that the pow has not been exercised.

NOW THESE PRESENTS WITNESS, that the said [*husband*] and [*christian name*], his wife, in execution of the aforesaid power given to them by the said recited indentures, and of every other power hereunto enabling them or either of them, Do and each of them Doth irrevocably direct, limit and appoint, that all the manors, messuage, lands, tenements and hereditaments comprised in the said recited indenture of release, or now subject to the subsisting uses thereof, with their rights, members and appurtenances, shall, from and after TESTATUM. Operative words.

the determination of such of the limitations and subject to such of the powers, contained in the same indenture, as are subsisting and antecedent in point of effect to the aforesaid

Use. power, remain and be To THE USE of the said [*eldest son*], his heirs and assigns for ever. IN WITNESS, &c.

No 16.

APPOINTMENT, *by the sole Donee of a General Power, to Uses to prevent Dower in favour of a Purchaser.*

Parties. THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*appointor*], of, &c. of the one part, [*purchaser*], of, &c. of the second part, and [*trustee for purchaser to prevent dower*], of the the third part. WHEREAS,

RECITALS, —of conveyance to such uses as the vendor shall appoint, by virtue of indentures of lease and appointment and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of appointment and release being made between, &c. the hereditaments hereinafter described now stand limited To the use of such persons, for such estates, intents and purposes, in such shares and in such manner as the said [*appointor*] shall, by any deed or deeds to be executed by him, in the presence of and to be attested by

—of contract for sale. two or more witnesses, direct or appoint. AND WHEREAS the said [*appointor*] has contracted with the said [*purchaser*] for the sale to him of the fee simple in possession of the said

TESTATUM. hereditaments, at the price of £——. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of the sum of £——, of lawful British money paid by the said [*purchaser*] to the said [*appointor*], at or before the execution of these presents, the receipt of which sum the said [*appointor*] hereby acknowledges, and from the same sum and every part thereof hereby acquits and discharges the said [*appointee*], his heirs, executors, administrators and assigns, The said [*appointor*], by virtue and in execu-

tion of the aforesaid power or authority given to him by the said recited indentures, and of every other power or authority enabling him in this behalf, Doth direct, limit and appoint, That all [*parcels*](58), Together with the appurtenances thereunto belonging, shall henceforth remain and be To THE USES following, namely, To such uses and in such manner as the said [*purchaser*] shall at any time, or from time to time, by any deed or deeds appoint; And in default of such appointment, To the use of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment for any manner of waste; and immediately after the determination of that estate by any means in his lifetime, To the use of the said [*trustee*], his executors and administrators, during the life of the said [*purchaser*]. In Trust for the said [*purchaser*] and his assigns, And immediately after the determination of the said estate hereby limited to the said [*trustee*], his executors and administrators, To the use of the said [*purchaser*](59) his heirs and assigns for ever. And the said *ap-*

Operative words. Parcels. Uses.

(58) In appointments, the description of the parcels commonly forms part of the recital of the instrument creating the power; the general words are reduced to a short mention of the appurtenances; and the clauses of "all estate," &c. and "all deeds," &c. are wholly omitted. This practice is founded on the nature of the instrument, which is merely a disposition of the *use*. Strict accuracy would seem to require that the instrument should be, in terms, an appointment of the use, and not of the land; but the form given in the text, and generally adopted, is sufficiently correct and more convenient.

Of the parcels, &c. in appointments.

(59) Sometimes the ultimate use, instead of being limited to the purchaser, his heirs and assigns, is limited to the heirs and assigns of the purchaser, or to the right heirs of the purchaser. But this form of limitation, which has been recommended for the sake of superior accuracy, (Butl. Fear. 8th ed. 347, n.; but see Prest. Est. 293,) is at once theoretically wrong and practically dangerous. The subject is intimately connected with the learning of the rule in Shelley's case, (1 Co. R. 93,) a rule which says, in substance, that if an estate of *freehold* be limited to A., with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs as original takers, shall confer the inherit-

Limitation to the heirs of the purchaser in uses to prevent dower.

RULE IN SHELLEY'S CASE.

Covenants by appointor.

pointor], for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*,] his appointees,

ance on A. the ancestor. Of this much-controverted rule an attempt will now now be made to develope the leading principles.

I. The law without the rule.

I. If the rule in question had *not* been adopted, land might have been limited for a particular estate of freehold (as to one in tail, for life, *pur auter vie, &c.*) with remainder to the heirs of the body, or heirs general, of the freeholder, which remainder, since *nemo est hæres viventis*, must have been *contingent* during his life, but, if not defeated by the determination in his lifetime of his particular estate,(*a*) would have vested on his death in the person or persons then answering the description of his heir or co-heirs, special or general. Thus the law would have stood. If not, why was the rule instituted?

II. Premises of rule.

II. The rule assumes and founds itself upon two pre-existing circumstances—a freehold in the ancestor, and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a REMAINDER,(*b*) it plainly excludes—1, the case of limitations differing in quality, the one being legal and the other equitable; 2, the case of limitations arising under distinct assurances; and, 3, the case of an *executory* limitation, by way of devise or use, and, consequently, upon *principle*, the case of a limitation arising under an appointment of the use,—but *authority* seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the HEIRS, it follows that with limitations to *sons*, *children*, or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personæ*, as distinguished from a limitation embracing the line of inheritable succession, the rule has nothing to do. In order to find whether the second limitation is a *remainder* to the *heirs* or not, we must resort to the general rules and principles of law. The rule, being a maxim of legal policy, conversant with *things* and not with *words*, applies whenever judicial exposition determines that *heirs* are described under a term properly descriptive of other objects, but stands excluded whenever it determines that other objects are described under the term *heirs*. Thus the word *children*, aided by the context, may have all the force of the word *heirs*, in which case the rule applies; while the word *heirs*, restrained by

(*a*) INTRODUCTION, p. 13, *suprà*.

(*b*) A remainder is "a remnant of an estate in lands, &c. expectant on a particular estate, created together with the same *at one time*."—Co. Litt. 143, a.

heirs and assigns, that notwithstanding any act, matter or thing done or permitted by the said [*appointor*] to the contrary,

the context, may have only the force of the word *children*, in which case the rule is utterly irrelevant. These are preliminary questions, purely of CONSTRUCTION, to be considered without reference to the rule, and to be solved by the ordinary process of interpretation. *That* point kept steadily in view would have prevented infinite confusion.

III. The operation of the rule is two-fold; first, it denies to the remainder the effect of a gift to the *heirs;* secondly, it attributes to the remainder the effect of a gift to the *ancestor* himself. It is, therefore, clear that the rule not only defeats the intention, but substitutes a legal intendment directly opposed to the obvious design of the limitations. A rule which so operates cannot be a rule of *construction*. As a consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor who is ascertained, the inheritance, limited in contingency to the heirs, *may* become *vested* in the ancestor; and, as another consequence of the same process, the ancestor's estate of freehold *may* merge in the inheritance. Thus—1. If land be limited to A. for life, remainder to his heirs or to the heirs of his body, the primary effect will be to give him an estate of freehold, (liable, of course, to merger,) with, by force of the rule, a remainder, *immediate* and *vested*, to himself in fee or in tail; (just as if the limitations were to him for life, remainder to *him and* his heirs, or to *him and* the heirs of his body,) and the final result, under the law of merger, will be, by the absorption of the particular freehold in the vested inheritance, to give him an estate in fee tail or an estate in fee simple in possession. But—2. If land be limited to A. for life, remainder, *if A. shall survive B.*, to his (A.'s) heirs or to the heirs of his body, then, as the remainder is contingent, because made to depend on the event of A.'s surviving B., the ancestor (A.) will take under the rule, not a vested, but a *contingent* inheritance; (just as if the limitations were to him for life, remainder, if he shall survive B., to *him*, A. *and* his heirs, or to *him and* the heirs of his body,) the rule changing the *object*, but not the *quality* of the remainder. Here, as the inheritance cannot vest, the particular estate of freehold will not merge, but A. will remain tenant for life, with an immediate *contingent* remainder to himself in tail or in fee. This remainder, in the event of his surviving B., will *vest* in him (A.); the estate of freehold will *then* merge, and he will thus have, as in the previous example, a fee tail or fee simple in possession. So—3. If land be limited to A. for life, remainder to B. for life or in tail, remainder to the heir or heirs of the body of A., then, by reason of the interposition of the estate for life or estate tail of B., the ancestor

III. Operation of the rule,

—*immediate* and *vested* remainder to the heirs,

—*contingent* remainder to the heirs,

—*mediate* remainder to the heirs.

—for right to appoint,

the said recited power is valid, subsisting and unexecuted, and the said [*appointor*] has in himself good right by virtue

(A.) has, under the rule, not an immediate, but only a *mediate* inheritance, (just as if the limitations were to him for life, remainder to B. for life or in tail, remainder to *him*, A. *and* his heirs, or to *him and* the heirs of his body,) the rule changing the *object*, but not the *position*, of the remainder. A., therefore, will be tenant for life, with a mesne *vested* remainder to himself in tail or in fee, in which remainder, if B.'s interposed estate should determine in A.'s lifetime, A.'s life estate will merge, and he will then have, as in the first example, a fee tail or fee simple in possession.—The obvious deduction from these examples is, that in no case does the *rule* disturb the particular estate of freehold in the ancestor, which is left to the uncontrolled operation of ordinary principles, merging or not merging, according as the remainder transferred by the rule from the heirs to the ancestor is absolute or conditional, proximate or remote. The estate of freehold is a *circumstance* without which the rule is dormant; but the rule, when called into action, exerts its force on the remainder alone. Why *that* circumstance was selected, we can only conjecture. It is affirmed, indeed, (Fear. C. R. 8th edit. 77; 1 Harg. Tracts, 500,) that a limitation to A. for *life*, with *remainder* to his heirs, is in truth the same thing as a limitation to *A.* AND *his heirs*. In the simple case thus put, the EFFECT, under the *rule*, aided by the doctrine of *merger*, is the same, but who will assert that the IMPORT is the same? And how singularly short-sighted does this reasoning appear, when it is recollected that the rule equally applies where the gift is, to A. for life, remainder (interposed) to B. for life, remainder to the heirs of A.; or to A. *pur auter vie*, remainder to the heirs of A.; or, to A. *durante viduitate*, remainder to the heirs of A.; or, to A. in tail, remainder to the heirs of A., &c.;—cases which need only to be mentioned in order to explode the theory which seeks to form a fee by the union of the two limitations. It is an error, and the fruitful parent of errors, to affirm that the limitations unite or coalesce under the *rule*, which has discharged *its* office by substituting the ancestor for the heirs in the second limitation.

IV. Mode of applying the rule.

IV. When the ordinary rules of construction have ascertained the coexistence of a freehold in the ancestor and a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to *the ancestor himself and* his heirs. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs:—reading the words "and his heirs,"—not, according to the notion referred to at the close of the preceding section of this note, as words of limitation of the estate of freehold

thereof to appoint by these presents the said hereditaments and premises with their appurtenances, to the uses and in

expressly *limited* to him, (which would be absurd,)—but as words of limitation of the estate in remainder *attributed to him by the rule.*

Erroneous views of the rule.

These positions, which really comprise the whole doctrine of the rule, appear in themselves to be clear and demonstrable; yet have judges and text-writers perplexed and confounded this branch of learning by insisting, at one time, that, upon *general principles*, the law would not allow of a remainder to the heirs, as purchasers, of an ancestor taking a particular estate of freehold, (Fear. C. R. 8th edit., 192; Harg. Tracts, 574,) or, in other words, that there is no special interdict at all—a short mode of ending the debate by annihilating the subject of it;—at another, that the rule is a key to the construction, nay, consults the *intention* of the limitations!—again, that where the remainder is immediate the limitations *unite* or coalesce, and that where the remainder is mediate they unite or coalesce *sub modo*, so as to admit the intervening estates, (Fear. C. R. 8th edit. 78,) or, in other words, that they are at once united and distinct, at once consolidated and unconfounded.

The rule, when viewed in its true light as a rule which refuses to one (and only one) given mode of disposition, the intended effect, and arbitrarily imposes a different effect, ceases to present that mysterious appearance with which acute and laborious, but misdirected, learning has invested it. Its reason may be lost, its policy may be questioned, but its authority must be acknowledged, while its application is relieved from every difficulty. No longer the sport of conflicting opinions or decisions, it has a determinate purpose, and a uniform result.

Doctrine of "general and particular intention,"

The subject of this note is intimately connected with the doctrine of "general and particular intention," which ever since the case of *Roe* d. *Dodson* v. *Grew*, (*a*) has occupied a large and prominent space in almost every discussion upon devises for life, with remainder to children, issue or heirs, and especially in the judgments of Lord Kenyon. In a work published some years ago, the writer ventured to question the doctrine, contending that it either meant what the Rule in Shelley's case imported, or that it was destitute of all meaning. (*b*) The arguments advanced seemed, however, to make but little progress against the force of inveterate opinion, and the great names with which the doctrine stood identified. It found too

—questioned.

—defended,

(*a*) Wilmot, 272; 2 Serj. Wilson, 322.
(*b*) Inquiry into the Effect of Limitations to Heirs of the Body in Devises, (1824,) 286.

—for quiet enjoyment, manner aforesaid; And also that the said hereditaments and premises, with their appurtenances, and the rents and profits

an able defender (*a*) in a gentleman, to whose labours we are indebted for some of the recent amendments in the law, but the mistery which attended the doctrine seemed rather to be increased by a defence which associated it with the apparently distinct doctrine of *cy pres*. (*b*) Another writer, indeed, of very high authority had lent his sanction to the doctrine, treating the cases commonly "associated with it as totally distinct" from those which depend upon the rule in Shelley's case, and observing that Mr. Fearne had "confounded the cases under discussion with those which depend strictly on the rule in Shelley's case." (*c*) The substance of the proposition advanced by the supporters of the doctrine was, that "all the cases in which the parent had been held to take an estate tail, notwithstanding the *heirs* or *issue* were to take as tenants in common, have been expressly decided on the ground of supporting the *general intention*, and have *not been governed by the rule in Shelley's case*. It is admitted that the rule will not apply where the word *heirs* or *issue* is explained to mean *children*, and that when *heirs* take as tenants in common by purchase, *heirs* must mean *children*." To this proposition the answer is obvious, that the moment we have ascertained that a limitation to *heirs* or *issue* designates *children*, the result must be the same as if the very word *children* had been used; the children, therefore, will take estates by purchase, (*d*) and the parent will not take an estate tail at all by force of *that* limitation. Why, "when *heirs* take as tenants in common by purchase *heirs* must mean *children*," is less apparent, since land may certainly be limited to A. for his life, or for the life of B. in trust for B, with remainder to such persons as at the death of A. shall answer the description of his heirs to take as tenants in common. The converse proposition, however, is true, that when *children* take as tenants in common, *children* cannot mean *heirs*, and, consequently, that a limitation to *heirs* (or *issue*) construed CHILDREN, can never give an estate tail to the parent.—Nevertheless, under the circumstances already stated, the attempt to rescue this

(*a*) Tyrrell's Suggestions, [not published,] 334, *et seq.* replied to, Hayes's Principles, 88.

(*b*) Butl. Fearn. Cont. Rem. 8th ed. 204, n.

(*c*) Sugden's Gilb. Uses. 41, n.

(*d*) *Denne* v. *Page*, 11 East, 603, n; *Hay* v. *Earl of Coventry*, 3 T. R. 83; *Foster* v. *Earl of Romney*, 11 East, 594; *Doe* v. *Vaughan*, 5 Barn. & Ald. 464; 1 Dowl. & Ryl. 52, [in these cases the children took only life estates, yet the gift over was restrained to a failure of such *children*]; *Goodright* v. *Dunham*, Dougl. 264; *Doe* v. *Perryn*, 3 T. R. 484; *King* v. *Marquis of Stafford*, 7 East, 521; and see *Stains* v. *Maddock*, 8 Vin. Ab. 448; 3 Bro. P. C. by Toml. 108; *Lethieullier* v. *Tracey*, Amb. 204, 220; *Doe* v. *Gunnis*, 4 Taunt. 313.

thereof, shall or may, at all times hereafter, be quietly held, received and enjoyed accordingly without any eviction, inter-

branch of the law from the perplexity occasioned by "general and particular intention" seemed to be nearly hopeless, when it received the powerful support of a writer often quoted in the previous part of this work.(*a*) Encouraged by such co-operation, and by the impression which had apparently been made, the doctrine was again examined. The substance of the argument against the doctrine is comprised in the following passage:—"The foregoing rules lead irresistibly to the conclusion, that the reasoning of Lord Kenyon upon general intention, in such cases as *Doe* v. *Smith*(*b*) and *Doe* v. *Cooper*,(*c*) has no foundation in law. That reasoning may be thus disposed of in a few words. If his lordship's version of the devise was correct, and it really imported a gift to A. for life, remainder to his *children*, and in default of issue of A., over, then 'issue' was clearly referable to the particular class of issue before designated, more especially in *Doe* v. *Smith*, where the children would have taken the inheritance; but admitting that *issue* might be taken to mean issue indefinitely, still this did not authorize the court to strike out the gift to the *children*, but warranted, at most, the construction of particular estates in the children, with remainder in tail to the first taker, with remainders over, so as to give effect to every part of the devise. On the other hand, if Lord Kenyon's reading of the devise was wrong, and the devise imported (as in sound legal construction it unquestionably did,) that which it expressed, a gift to A. for life, remainder to the heirs of his body, or his issue, (*i. e.* indefinitely,) and in default of issue of A., over, the effect was of course determined by the rule in Shelley's case, which gives the inheritance to the ancestor, and the case was not distinguishable by a shade of difference from fifty others in which that rule had produced the same result. The like observations will apply to the arguments of Wilmot, C. J. in *Roe* v. *Grew*, and with additional force, because the devise over was in default of *such* issue;—yet it was thought consistent with sound construction to burthen the express relative with a 'weighty and comprehensive intention,' a 'principal, capital, and most material destination,' which the antecedent was assumed to be incapable of sustaining. The note of his Lordship's judgment concludes with these remarkable words;—'if estate tail, a *chance*—if estate for life, no *chance*—better to have a chance of something.' The grand result, therefore, of this theory, (for the doctrine can have no practical existence,) which, consigning to oblivion the rules of law, overthrows by force of *intention* alone, and builds upon *intention* alone, is to

(*a*) Jarman on the Construction of Devises, 552; *infrà*, 282, n.
(*b*) 7 T. R. 531. (*c*) 1 East's R. 229.

ruption or denial from or by the said [*appointor,*] or any person or persons rightfully claiming or to claim through,

give the issue—what?—a chance of something. This conceit, pregnant with the absurdity of placing the inheritance in the power of the first taker in furtherance of the *intention*, introduced the perplexing distinction between cases governed by the rule in Shelley's case, and cases governed by general intention—a distinction without a difference, for the courts would never have held the devisee for *life* to be tenant in tail if the rule had not compelled them either to adopt that course, or to reject altogether the construction of an estate tail. They would have saved both the particular intent, and general intent, (if we must use these unmeaning terms,) by holding the first taker to be tenant for life, with *remainder* to the heirs of his body with remainder over. Lord Redesdale has justly observed, (*Jesson* v. *Wright*, 2 Bligh, 57,) that 'to say that the general intent shall overrule the particular is not the most accurate expression of the principle of decision, but that the rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words, it is very clear that the testator meant otherwise'—adding 'that those who have to decide on such cases ought not to rely on petty distinctions, which only mislead parties, but look to the words used in the will.(*a*)

—over-ruled. But whatever might be the value of these arguments, it cannot be doubted that the increasing embarrassment arising from the indiscriminate resort to "general and particular intention," which, from meaning originally nothing, had come to mean almost any thing or every thing, contributed mainly to bring the doctrine into discredit. It appears at length to have been solemnly adjudged a mischievous fallacy by the Court of King's Bench in the late case of *Doe* d. *Gallini* v. *Gallini*, 2 Nev. & Mann. 632; 5 Barn. & Adolph. 621. Lord Denman, C. J. in delivering the judgment of the Court animadverts upon the doctrine in these terms:—"The doctrine that the general intention must over-rule the particular intention, has been much, and we conceive justly, objected to of late, it being as a general proposition incorrect and vague, and likely to lead in its application to erroneous results. See *Powell* on Devises, 3d edit. c. 27, vol. ii. p. 552.(*b*) In its origin, it was merely descriptive of the operation of the rule in Shelley's case; and it has since been laid down in others, where technical words of limitation have been used, and other words, shewing the intention of the testator, that the objects of his bounty should take in a different way from

(*a*) Hayes's Principles, (1829,) 44; and see 25, 106.
(*b*) The second volume, cited in the judgment, is entirely the work of Mr. *Jarman*.

under or in trust for him; Free from or by the said [*appointor*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, rights, titles and incumbrances, created or occasioned by the said [*appointor*], or any person or persons claiming or to claim through, under or in trust for him. And lastly, that the said [*appointor*], and every person rightfully claiming or to claim, through, under, or in trust for him, will, at any time or times, at the request and costs of the said [*purchaser*], his appointees, heirs or assigns, make, do and execute every such act, deed, or assurance for more effectually assuring the said hereditaments and premises or any part thereof, to the uses aforesaid, or according to the direction of the said [*purchaser,*] his appointees, heirs or assigns, as by the said [*purchaser,*] his appointees, heirs or assigns, or his or their counsel in the law shall be reasonably required or advised, and as shall be tendered to be done or executed. IN WITNESS, &c.

—for freedom from incumbrances,

—for further assurance.

that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson* v. *Wright* (*a*). This doctrine of general and particular intent ought to be carried no further than this; *and thus explained, it should be applied to this and all other wills.* Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject."

Such must be the ultimate fate of all legal doctrines which, having no foundation in principle, are "vague" in their terms, and "lead in their application to erroneous results;" for the impossibility of understanding and applying them induces at last the necessity of disclaiming them.

It is a remarkable fact, that when two eminent conveyancers, favourable to the doctrine, were asked for a definition and example, each stated and illustrated it in a manner wholly different!

(*a*) 2 Bligh, 57.

II. *WITHOUT TRANSMUTATION OF POSSESSION.*

Bargain and Sale.

No. 17.

BARGAIN *and* SALE *to a Purchaser in Fee.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*bargainor*], of, &c. of the one part, and [*bargainee*], of, &c. of the other part, WITNESSETH,

Testatum.

Consideration.

that in consideration of the sum of £——, of lawful British money paid by the said [*bargainee*] to the [*bargainor*], on the execution of these presents, the receipt of which sum, and that the same is in full for the absolute purchase of the fee simple in possession, whereof the said [*bargainor*] is now seised, of the manor, messuages, lands and hereditaments hereinafter described, the said [*bargainor*] hereby acknowledges, and from the same sum hereby acquits and releases the said [*bargainee*], his heirs, executors, administrators and assigns, The said [*bargainor*] Hath bargained and sold,(60)

Operative words.

Bargains and sales, proper and improper, distinguished.

(60) Conveyances under the old bankrupt acts, &c. purporting to be *bargains and sales*, are not unfrequently confounded with bargains and sales within the statute of uses, but they are in fact perfectly distinct in their nature. A bargain and sale within the statute of uses, (or, in other words, a bargain and sale properly so called,) is a contract, in consideration of money or money's worth, by the owner of land, for the total or partial alienation of his interest, which contract raises a use in favour of the purchaser, grounded on the seisin of the bargainor, and the use so raised (provided the contract, if it concern the freehold, be attended with the ceremonies prescribed by the statute of enrolment, 27 Hen. 8, c. 16,) is instantly transformed into possession by the statute of uses. The enrolment of the *proper* bargain and sale has relation to the execution of the instrument. The statute of enrolment denies effect to the assurance, "*except* the same bargain and sale be made by writing, indented, sealed and enrolled, &c., and the same enrolment be made within six [lunar] months after the date," &c.;—the condition being

Relation of enrolment of the proper bargain and sale.

And by these presents Doth bargain and sell unto the said [*bargainee*], his heirs and assigns, All [*parcels*], Together Parcels.

complied with, the statute of uses imparts legal efficacy to the use from its inception. But a bargain and sale under the bankrupt acts is merely the execution of a naked authority given to A. to dispose of the estate of B., and has no other title to the appellation of a bargain and sale than that which it derives from the occurrence of the words "bargain and sell" in the statute which confers, and in the instrument which executes the authority. The same observation applies to every instrument, assuming the form of a bargain and sale, by which lands are disposed of in pursuance of a power or authority, whether created by statute or by other means. Suppose, for example, that land were conveyed to such uses as A. should, by deed indented, and enrolled within six months from the date, *bargain and sell* the same;—a deed perfected conformably to this power would have all the qualities and incidents of an *appointment*, and none of the qualities or incidents peculiar to a *bargain and sale;* though, if the appointment were made to A., to the use of B., the legal estate would vest in A., just as under a bargain and sale to A., to the use of B., the use is executed in A. Considered as the execution of a power, the instrument could operate only from the time of the completion of the ceremonies prescribed by the power. So, an instrument made in pursuance of a statutory authority to bargain and sell, has its legal inception in the fulfilment of the requisites of the statute. If the power or authority requires the deed to be enrolled, but does not limit the time, the enrolment is wholly independent of the period fixed by the statute of enrolment, (*Ingram* v. *Parker*, T. Raym. 239, *cited*,) but till enrolment the power or authority remains unexecuted at law. The enrolment of a proper bargain and sale relates back to the creation of the use, which springs, on the execution of the deed, from the seisin of the bargainor; but it is manifest that an instrument enrolled, purporting to be a bargain and sale in pursuance of a mere power or authority to "bargain and sell by deed enrolled," can have no such relation. It is hardly necessary to add, that a power or authority to *bargain and sell* may be executed by any other form of expression; and as the use, in such cases, of the words *bargain and sell*, is apt to suggest an erroneous notion of the nature and operation of the instrument, it seems desirable to avoid using them.—An authority given to executors to *sell*, is in effect a power to ascertain the purchaser, who is *in* as a devisee under the will, and the result of the execution of the power is to supply the devise with an object.

Appointments purporting to be bargains and sales.

Under the statute 10 Anne, c. 18, s. 3, examined copies of the enrolment of a bargain and sale (i. e. such a bargain and sale as is within the statute

Copies of enrolment of bargain and sale, evidence.

General words. with all courts, franchises, rents, services and other privileges and fruits of seigniory, mines, minerals, trees, woods, ways, waters, watercourses, profits, easements, rights, members and appurtenances whatsoever to the said manor and other hereditaments and premises belonging, or at any time heretofore held, used, or enjoyed therewith. And also all the estate, right, title, interest, claim and demand, at law or in equity, of the said [*bargainor*], in, to, out of, or upon the said manor and other hereditaments and premises, or any part thereof, with their appurtenances, To HAVE AND TO HOLD the said manor and other hereditaments and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto and to the only proper use of the said [*bargainee*], his heirs and

All estate clause.

HABENDUM.

of enrolment) are admissible in evidence, without proof of the loss of the original. The conveyance by bargain and sale is, therefore, sometimes adopted on account of the security and facility in point of evidence afforded by the enrolment, particularly where the subject of conveyance is a large estate about to be sold in lots; and it was formerly much the practice to convey to a purchaser, as well by lease and release, as by a contemporaneous bargain and sale enrolled. It should be borne in mind, however, that if a bargain and sale be made to A. to uses, the legal estate will be executed in A., and the uses will in effect be trusts in equity, for that which passes by the bargain and sale is the *use*, upon or out of which uses of course cannot be limited. But it is conceived that the use may be distributed through a series of limitations by way of bargain and sale, and consequently that a bargain and sale may be made to the use of a purchaser for life, with remainder to a trustee for the life of the purchaser, with remainder to the purchaser in fee. The power of appointment, however, which formed part of the limitations hitherto commonly inserted to prevent dower, would be inadmissible.

Bargain and sale for a particular estate, with remainders.

The consideration of money, or of money's worth, is essential to raise the use, but it is by no means requisite that the consideration should move from the bargainee to the bargainor. The use would arise upon a bargain and sale by A. to B. in consideration of money paid by C. to D.

With respect to bargains and sales in bankruptcy, they are taken away, except as to copyholds, by the Act of 1 & 2 W. 4, c. 56, ("An Act to establish a Court in Bankruptcy,") which vests all the other real estate of the bankrupt in the assignees by virtue of their office, s. 26. As to the conveyance of copyholds under the bankrupt acts, *vide infrà*, Part III.

Bargains and sales in bankruptcy.

assigns for ever. And the said [*bargainor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*bargainee*], his heirs and assigns, That notwithstanding any act, matter or thing done or permitted by the said [*bargainor*] or any of his ancestors to the contrary, the said [*bargainor*] has in himself good right by these presents to bargain and sell the said hereditaments and premises, with their appurtenances, unto and to the use of the said [*bargainee*], his heirs and assigns for ever. And also that the said hereditaments and premises, with their appurtenances, and the rents, issues and profits thereof, shall or may at all times hereafter be peaceably and quietly held, received and enjoyed by the said [*bargainee*], his heirs and assigns, without any eviction, interruption or denial from or by the said [*bargainor*], or any person or persons rightfully claiming or to claim under or in trust for him, or under any of his ancestors. Free and clear, or by the said [*bargainor*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, right, titles, charges and incumbrances created or occasioned by the said [*bargainor*] or any of his ancestors, or any person or persons claiming or to claim under or in trust for him, or under them, or any of them. And lastly, that the said [*bargainor*], and every person rightfully claiming or to claim under or in trust for him, or under any of his ancestors, will at any time or times, at the request and costs of the said [*bargainee*], his heirs or assigns, make and execute every such act, deed, or assurance for more effectually or satisfactorily assuring the said hereditaments and premises, or any part of the same, with the appurtenances, unto or to use of the said [*bargainee*], his heirs or assigns, as by the said [*bargainee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be made or executed. IN WITNESS, &c.

Covenants by bargainor,

—for right to convey,

—for quiet enjoyment,

—for freedom from incumbrances,

—for further assurance,

No. 18.

BARGAIN *and* SALE *for a long Term of Years, by way of Mortgage.*

Parties. THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*mortgagor*], of, &c. of the one

TESTATUM. part, and [*mortgagee*], of, &c. of the other part, WITNESSETH,

Consideration. that in consideration of the sum of £——, of lawful British money, lent by the said [*mortgagee*] to the said [*mortgagor*], immediately before the execution of these presents, the receipt of which sum the said [*mortgagor*] hereby acknowledges, and therefrom releases and discharges the said [*mortgagee*],

Operative words. his executors, administrators and assigns, The said [*mortgagor*] Hath bargained and sold,(61) And by these presents Doth bargain and sell, unto the said [*mortgagee*], his executors,

Parcels. administrators and assigns,(62) All [*parcels*], Of which said hereditaments and premises the said [*bargainor*] is now seised in fee simple in possession, Together with all easements, rights, members and appurtenances to the said heredi-

Mortgage by bargain and sale for years. (61) Mortgages for years are commonly called mortgages by *demise*, but when the mortgagor is seised, they take effect as bargains and sales. The consideration raises the use, and the mortagee is presently in possession under the statute of uses, without entry, and (the statute of 27 Hen. 8, c. 16, not extending to the creation of terms of years,) without enrolment. The operative words generally used are, "*grant*, bargain, sell and *demise*."

Words of limitation—estates *pur auter vie*. (62) It seems more correct to omit the words of limitation in the testatum, it being the proper office of the habendum to limit the estate. Words of limitation are not essential to the creation of a term of years, nor, indeed, to the creation of any estate less than an estate of inheritance; though in a late case it was inadvertently held, that for want of words of limitation, or equivalent words, in the devise of an estate *pur auter vie*, the devisee took only an estate for the joint lives of herself and the *cestui que vie*. *Doe* v. *Robinson*, 8 Barn. & C. 296, and 4 Mann. & Ryl. 249. But see Mr. Manning's note, *ib.* 263, in which the decision is shown to be utterly inconsistent with the common law and statute law relating to estates *pur auter vie*.

taments and premises in anywise belonging.(63) And also all deeds and writings relating to the title of the said [*bargainor*] to the said hereditaments and premises, or any part thereof, TO HAVE AND TO HOLD the said hereditaments and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto the said [*mortgagee*], his executors, administrators and assigns, henceforth for the term of ~~1000 years~~, without impeachment of waste, nevertheless subject to the proviso for redemption hereinafter contained, (that is to say,) Provided always, That if the said [*bargainor*], his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said [*bargainee*], his executors, administrators, or assigns, the sum of £——, of lawful British money, with interest for the same after the rate of £5 per cent. per annum, in Lincoln's Inn Hall, in the county of Middlesex, between the hours of eleven and twelve o'clock in the forenoon, on (64) the —— day of ——next, without deduction, Then these presents shall be void. And the said [*bargainor*], for himself, his heirs, executors, administrators and assigns, hereby covenants with the said [*bargainee*], his executors, administrators and assigns, that the said [*bargainor*], his heirs, executors, administrators or assigns, will pay, or cause to be paid unto the said [*bargainee*], his executors, administrators or assigns, the said sum of £——, with interest for the same after the rate aforesaid, at the place and time and in manner hereinbefore appointed for the payment there-

Deeds, &c.

HABENDUM,

—to bargainee for a term of 1000 years.

Proviso for redemption.

Covenants by bargainor,

(63) The "all estate" clause is omitted, because the bargainor departs only with a limited interest.

(64) The condition must be strictly complied with to defeat the legal effect of the deed. The money must therefore be paid *on*, and not before or after the appointed day. If the money were made payable on *or before* the day, then the lender would be exposed to the inconvenience of having it tendered without notice. If the mortgagor makes default in payment, he cannot afterwards, according to the rule of equity, oblige the mortgagee to accept the money without giving six calendar months previous notice.

Mortgage condition.

—for right to bargain and sell,

—for quiet enjoyment after default in payment of the money,

—for freedom from incumbrances,

—for further assurance.

of: And also that (65) the said [*bargainor*] has good right, by these presents, to bargain and sell, or otherwise assure the said hereditaments and premises unto the said [*bargainee*], his executors, administrators and assigns for the said term of 1000 years in manner aforesaid: And also that if default shall be made in payment of the said sum of £——, or the interest thereof, at the place and time and in manner hereinbefore appointed for payment thereof, it shall be lawful for the said [*bargainee*], his executors, administrators, or assigns thenceforth during the residue of the said term of 1000 years, quietly to enter upon and enjoy the said hereditaments and premises, and to take the rents and profits thereof, without any eviction, interruption or denial whatsoever, Free and clear, or by the said [*bargainor*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, rights, charges and incumbrances whatsoever: And (66) that the said [*bargainor*], and every person having or rightfully claiming or to claim any estate, right or interest in or to the said hereditaments and premises, or any part thereof, will at any time or times, at the request of the said [*bargainee*], his executors, administrators or assigns, but at the costs of the said [*bargainor*], his heirs, executors, administrators or assigns, make, do and execute

Covenants for title in mortgages.

(65) It will be observed that the qualifying words "notwithstanding any act, &c. by the mortgagor," &c. are omitted, and that the other covenants are likewise unqualified, for a mortgagee, though he takes the estate merely as a pledge, may of course demand covenants amounting to a warranty of title.

Covenant for further assurance in mortgages,

(66) The words "in case default shall be made in payment of the said sum of £——, or the interest thereof, at the time hereinbefore appointed for payment thereof." should *not* be inserted here. The consequence of their insertion would be, that if the mortgagee were to discover a defect in his security before the day of payment, he could not immediately call upon the mortgagor under his covenant to remedy it, but must wait till it was perhaps no longer remediable. The mortgagor might be tenant in tail and die before the day of payment.

every such act, deed, conveyance or assurance for more effectually or satisfactorily assuring the said hereditaments and premises, or any part thereof, unto the said [*bargainee*], his executors, administrators or assigns, for the residue which shall be then unexpired of the said term of 1000 years (67), according to the true intent of these presents, as by the said [*bargainee*], his executors, administrators or assigns, or his or their counsel in the law shall be reasonably advised and required. Provided nevertheless, that until default shall be made in payment of the said sum of £——, or the interest thereof, at the time and in manner hereinbefore appointed for payment thereof, it shall be lawful for the said [*bargainor*], his heirs or assigns, to continue in the possession and receipt of the rents and profits of the said hereditaments and premises, without any interruption or denial by the said [*bargainee*], his executors, administrators or assigns. IN WITNESS, &c.

Proviso for enjoyment by bargainor till default.

No. 19.

BARGAIN *and* SALE *for a Year.* (68).

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*bargainor*], of, &c. of the one part, and [*bargainee*], of, &c. of the other part, WITNESSETH, TESTATUM.

Parties.

(67) Sometimes the words "freed and discharged from the aforesaid proviso for redemption, and all equity of redemption, by virtue thereof," are introduced in this place; but they are wholly nugatory, for the equity of redemption cannot be excluded by any prospective stipulation.

—discharge from old equity of redemption.

(68) The bargain and sale upon which the release is founded, when land is conveyed by lease and release, is commonly called a *lease for a year*. It is properly a bargain and sale, entitling the bargainee to the use for a year; the statute instantly converts the use into a legal estate for a year, and then the bargainee, as tenant in possession, is in a condition to accept a common law release of the reversion.

Lease for a year.

Nominal consideration.

that in consideration of 5*s.* of lawful British money paid (69) by the said [*bargainee*] to the said [*bargainor*], on the execution of these presents, the receipt whereof is hereby acknowledged, The said [*bargainor*] (70) Hath bargained and sold, and by these presents Doth bargain and sell (71) unto

Operative words.

Nominal consideration.

(69) The actual payment or tender of the 5*s.* is unnecessary to the raising of the use, but it is indispensably necessary to *express* a valuable consideration.

Parties to a lease for a year.

(70) The safest rule for general adoption is to make all the conveying parties to the release join in the lease for a year. But the only material party is the *legal* owner of the immediate *freehold*. Thus, if the land be limited to A. for the life of B., in trust for B., with remainder to C., the conveying parties to the release will be A., B., and C., but the lease will be properly made by A. alone. The concurrence, however, of A., B., and C. would render the conveyance effectual, even if it should prove that A. had destroyed his particular estate, or that B.'s estate was legal. So, where a mortgagee in fee and the mortgagor are the conveying parties to the release, it is clear that, if the mortgage was a valid legal conveyance, the mortgagor, having a mere equity, need not join in the lease, but his concurrence will guard against the possibility of the legal fee being still in him, in consequence either of a defect in the mortgage, or of the mortgage being inadmissible in evidence from not being duly stamped. In many cases, however, the lease for a year is loaded with parties altogether useless, as where, the fee being vested in trustees for sale, the persons beneficially interested in the produce are made to join in the lease.

Parcels of lease for a year.

(71) The parcels in the lease and release should be the same. Sometimes, though rarely, the parcels of the release are introduced by way of recital, to which the operative part of the deed refers. The parcels of the lease may then assume the following form:—"All those messuages, lands, tenements and hereditaments comprised in and conveyed by certain indentures, of, &c. [*pursuing the referential description in the operative part of the release.*] In which indentures the said hereditaments are described as follows, namely, 'All that' [*insert the description contained in the recital of the release,*] Together with," &c. The general words should also be the same in both deeds. When the parcels are long, the lease may be indorsed upon the engrossment of the release, and the parcels be in this form:—"All those messuages, &c. comprised and described in the writing within contained, and intended to be, when perfected, the indenture of release hereinafter referred to. Together with, &c. To have and to hold the

the said [*bargainee*], All [*parcels*], Together with all, &c. [*general words*], To HAVE AND TO HOLD the said hereditaments and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto the said [*bargainee*], his executors, administrators and assigns, from the day next before the day of the date of these presents, for the term of one year (72), To THE INTENT that by force of the statute

Parcels.

HABENDUM, —to bargainee for one year.

To the intent that he may be capable of a release.

said hereditaments and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto the said [*bargainee*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term of one year, To the intent that by force of the statute made for transferring uses into possession, the said [*bargainee*] may be in the actual possession of the said hereditaments and premises, and be enabled to accept the release intended to be made to him of the immediate reversion in fee-simple of the said hereditaments and premises, by an indenture of release intended to bear date the day next before the day of the date of these presents, and to be made between [*parties to the release*], and on the last skin of the engrossment of which indenture of release these presents are indorsed;" and the actual possession clause of the release may refer to the lease as "indorsed on the last skin of this indenture, being the indenture thereby referred to." Another and a preferable plan is, to insert the full description in the indorsed lease, and refer to it by the release, thus:— "All those messuages, &c. comprised and described in an indenture, bearing date the day next before the day of the date of these presents, and indorsed on the —— and —— skins of these presents, and of which hereditaments the said [*releasee*] is now in the actual possession by virtue of the bargain and sale thereby made to him by the said [*bargainor*], in consideration of 5*s.* for one year, &c., and by force of the statute," &c. Considering the accidents which are continually occurring to the lease for a year in its separate state, it is very desirable that by means of indorsement or annexation the lease and release should form, mechanically as well as legally, one assurance.

Release to mortgagee for years.

(72) It is hardly necessary to apprise the student that there is no magic in the term of *one* year. If A. is in possession under a mortgage for 500 years, operating as a bargain and sale, and founded on a really valuable consideration, he is *a fortiori* capable of a release; yet grave doubts have been entertained whether a lease for *a year* must not precede a release to A. See *Chatfield* v. *Parker*, 2 Mann. & Ryl. 540, and the notes to *Doe* v. *Maisey*, 3 Mann. & Ryl. 110.

made for transferring uses into possession, the said [*bargainee*] may be in the actual possession of the said hereditaments and premises, and be enabled to accept the release intended to be made to him of the immediate reversion in fee simple of the said hereditaments and premises by an indenture already engrossed, and intended to bear date the day next after the day of the date of these presents, and to be made between [*parties to the release*], To the uses and in manner therein expressed. IN WITNESS, &c.

No. 20.

Covenant to stand Seised.

COVENANT TO STAND SEISED *to Uses in favour of the Covenantor, his Wife and Children.*

Parties. THIS INDENTURE, made the —— day of ——, in the year ——; Between [*covenantor*], of the one part, and [*covenantees*] (73), of the other part, WITNESSETH, that in consider-

Testatum.

Covenant to stand seised.

(73) Before the statute of uses, a covenant to stand seised, like a bargain and sale, charged the person of the legal owner with the performance of a use or confidence, but conferred no legal estate in the land. Equity would not enforce the conscientious obligation created by the covenant, in favour of strangers not connected by blood or marriage with the covenantor. The statute communicated to the covenant the effect of a legal conveyance, but the law still requires the same consideration of blood or marriage, just as it requires the consideration of money or money's worth to raise the use upon a bargain and sale. In short, those circumstances which were essential to raise the use before the statute must still exist, if not in substance, yet in form. It follows, that a covenant to stand seised is not adapted to the purposes of a modern settlement, because trust estates and terms can be limited only to relations of the covenantor, while powers of leasing, selling and exchanging, &c. cannot be limited at all.—A deed indented, purporting to be a covenant to stand seised, but incapable of operating as such, may operate as a bargain and sale, provided it be supported by the requisite consideration, and be duly enrolled: and although a co-

ation of the marriage heretofore solemnized between the said [*covenantor*] and [*Christian name*], now his wife, and of the natural love and affection which he bears towards her and towards his [*brothers*], the said [*covenantees*], and in order to make some certain provision for her and for the children of the said marriage, The said [*covenantor*], for himself and his heirs, hereby covenants with the said [*covenantees*], and their heirs, That the said [*covenantor*] and his heirs shall henceforth stand seised of All [*parcels*], All which said hereditaments and premises the said [*covenantor*] is now seised of for an estate of inheritance in fee simple in possession, Together with the rights, members and appurtenances thereto belonging, To THE USE of the said [*covenantor*] and his assigns, during his natural life, without impeachment of waste. And on the determination of that estate in his lifetime, To the use of the said [*covenantees*], their executors and administrators, during the life of the said [*covenantor*], Upon Trust to preserve the contingent remainders hereinafter limited, but to permit the said [*covenantor*] and his assigns to receive the rents and profits of the said hereditaments and premises during his life. And immediately after his decease, To THE USE and intent that the said [*Christian name*], the wife of the said [*covenantor*], in case she shall survive him, may receive out of the rents and profits of the said heredi-

Consideration.

Operative words.

Parcels.

Uses.

—covenantor for life,

—trustees, for life of covenantor, to preserve contingent remainders,

—rent-charge to wife, surviving, for life, in bar of dower.

venant to stand seised may fail to operate as a legal conveyance, yet it may entitle the covenantees to an action at law, and, if supported by a consideration valuable or meritorious, may be specifically enforced as a contract in equity. On the other hand, a deed purporting to be a bargain and sale, but failing of effect as such, may be effectual at law as a covenant to stand seised, if supported by the requisite consideration of blood or marriage. It cannot be too strongly impressed upon the student that assurances depend for their character and effect less upon the form of the instrument itself, than upon the state of the title, the observance or non-observance of prescribed ceremonies, and other extrinsic circumstances, so that the question whether a given instrument is really a feoffment, grant, release, bargain and sale, &c. cannot be solved by means of internal evidence alone.

Effect of assurances, how to be determined.

taments and premises, a yearly rent-charge of £—— sterling money, clear of land-land-tax and all other deductions, by equal quarterly portions, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first quarterly portion to be paid on such of the said days as shall happen next after the decease of the said [*covenantor*] ~~and which rent-charge shall be accepted by~~ her in bar and in satisfaction of her dower, ~~thirds and freebench.~~ AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rent-charge shall be in arrear for twenty-one days after the same shall become due, it shall be lawful for the said [*Christian name*] and her assigns to enter upon the same hereditaments and distrain for the arrears of the said yearly rent-charge, and the distresses then and there found to dispose of according to law, in order that such arrears and all incidental costs and expenses may be satisfied. AND TO THIS FURTHER USE and intent, that when and so often as the said yearly rent-charge shall be in arrear for thirty days after the same shall become due, it shall be lawful for the said [*wife*] and her assigns, without any formal demand, to enter into the possession of the same hereditaments, or any part thereof, in the name of the whole, and take the rents and profits thereof until such arrears, and all incidental costs and expenses, together with so much of the said yearly rent-charge as shall grow due during such possession, shall be satisfied, such possession to be without impeachment of waste. ~~And subject~~ to the said yearly rent-charge and the remedies for enforcing payment ~~thereof;~~ TO THE USE of all the children (74) of the said

Power of distress for securing rent-charge.

Power of entry for securing rent-charge.

Children of covenantor and his wife in common in fee,

Limitation to objects as a class.

(74) This is a limitation to "children" as a class, which, without the aid of any other words, will comprehend as well all the existing children, as all the children coming into existence before the determination of the particular estates limited for the life of the husband. The learning connected with this subject cannot be compressed within the compass of a note; but it may be useful to illustrate the distinction between a limitation

[*covenantor*] by the said [*Christian name*], his wife, in equal shares, as tenants in common, and their respective heirs and assigns, but if any of such children shall die under the age of twenty-one years, without leaving issue living at his or her death, Then as to the share or shares of the child or respective children so dying, as well original as accruing under this limitation, To THE USE of the other child or children of the said [*covenantor*] and [*Christian name*] his wife, and if more than one, in equal shares as tenants in common, and the heirs and assigns of such other child or respective children. But if no child of the [*covenantor*] by the said [*Christian name*] his wife, shall attain the said age, (or dying under that age, shall leave issue living at his or her death,) Then, as to the said hereditaments and premises, To THE USE of the survivor (75) of them, the said [*covenantor*] and [*Christian name*], and the heirs and assigns of such survivor. IN WITNESS, &c.

—with cross executory limitations between them in fee,

—survivor of covenantor and wife in fee,

to objects individually, and to objects as a *class*, by a familiar instance. Under a devise to the testator's "children," either as joint tenants or tenants in common, the children living at his death will take, as constituting the class, the whole benefit of the devise, in exclusion of children dying in his lifetime. It follows, that, if at the time of making the will, the testator had two children, John and Jane, and John should die before the testator, and Jane survive the testator, Jane would take the entirety. But if the devise were to the testator's children, John and Jane," or (the testator having only two children, John and Jane), to the testator's "*two* children," or to the testator's "children *now living*," the children would then take in their individual capacity. If, therefore, John should die before the testator, and Jane survive the testator, the devise would lapse as to an undivided moiety, and Jane would take, under such devise, only the other moiety. Hence expressions referring to existing children, either *nominatim* or as "children now born," &c. should be avoided in a limitation designed to comprehend the objects as a class.

(75) This limitation to the *survivor* is a contingent remainder, for till the death of the husband or the wife, the remainder has not an ascertained object; and though one or the other must survive, yet the remainder may never take effect, inasmuch as the particular estates of the husband and the trustees *may* determine during the joint lives of the husband and wife.

Contingent remainder to *survivor*.

PART III.

MIXED ASSURANCES.

Conveyances on Sales.

No. 21.

CONVEYANCE *by* APPOINTMENT *and* LEASE *and* RELEASE *to a Purchaser.* (76)

Date.

Parties.

THIS INDENTURE of three parts, made the —— day of ——, in the year of our Lord ——, BETWEEN [*vendor*], of, &c. of the first part, [*purchaser*], of, &c. of the second part, and [*trustee for purchaser*], of, &c. of the third part.

Recitals, —of conveyance of freeholds, by lease and release and fine, to the common uses to prevent dower in favour of the vendor,

WHEREAS by virtue of indentures of lease and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between, &c. [*names of parties*], and by a fine duly levied by the said —— and —— his wife, in —— term, in the —— year of the reign of his present majesty, in pursuance of a covenant contained in the said indenture of release, the freehold hereditaments hereinafter described and hereby released or otherwise assured or intended so to be, with their appurtenances, now stand limited to such uses, for such estates, and in such manner as the said [*vendor*] shall at any time, or from time to

Conveyance on sale of freeholds and copyholds at an entire price.

(76) This precedent is adapted to a sale of freehold and copyhold lands at an entire price, but the parts relating to the copyhold lands may be readily separated. So far as regards the freehold lands, the precedent exhibits the form of conveyance in general use for the transfer of the fee upon a sale by a vendor entitled under the common uses to prevent dower. Much of the exuberance of expression which occurs in the ordinary forms has, however, been pruned away.

time, by any deed or deeds direct or appoint, and in default of such direction or appointment, to the use of the said [*vendor*] and his assigns during his life, without impeachment of waste, with remainder to the use of the said [*trustee for vendor*], his executors and administrators, during the life of the said [*vendor*], in trust for the said [*vendor*] and his assigns, with remainder to the use of the said [*vendor*], his heirs and assigns. AND WHEREAS at a court-baron held for the manor of ——, in the county of ——, on the —— day of ——, in the year ——, the said [*vendor*] was admitted tenant to the copyhold hereditaments hereinafter described with their appurtenants, to hold to the said [*vendor*], his heirs and assigns, at the will of the lord, according to the custom of the said manor, and by the uses and services therefore due and of right accustomed. AND WHEREAS the said [*vendor*] lately contracted and agreed with the said [*purchaser*] for the sale to him of the fee-simple in possession of the said freehold and copyhold hereditaments, at the entire price of £——. AND WHEREAS it has been agreed that the sum of £——, part of the said price, shall be deemed the consideration for the said freehold hereditaments, and that the sum of £——, the residue thereof, shall be deemed the consideration for the said copyhold hereditaments.(77) AND WHEREAS, in pursuance of the said contract, so far as concerns the said copyhold hereditaments, at a special court-baron held for the said manor on the day of the date of these presents, [*or*, out of court, at or immediately before the execution of these presents,] the said [*vendor*], in consideration of the sum of £—— paid to him by the said [*purchaser*], has surrendered into the hands of the lord of the said manor, the copyhold hereditaments following, (namely) all [*copyhold parcels*], together with the rights, members and appurtenances thereto belonging, To

—of vendor's admittance to copyholds,

—of contract for sale of freeholds and copyholds,

—that the price has been apportioned,

—of surrender by the vendor to the purchaser of the copyholds, and the purchaser's admittance.

(77) An apportionment is necessary on account of the ad valorem duty imposed by the act, 55 Geo. 3, c. 184, though the purchaser is at liberty to distribute the entire price as he may think fit. But an apportionment which consults the relative values is advisable, with reference as well to the title, as to damages on the covenants.

Apportionment of entire price.

the use of the said [*purchaser*], his heirs and assigns for ever, to hold at the will of the lord, according to the custom of the said manor, and by the rents, suit and services therefore due and of right accustomed, and at the same court the said [*purchaser*] has been admitted tenant according to the tenor of such surrender.(78) NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, so far as concerns the said freehold hereditaments, and in consideration of the sum of £——, paid by the said [*purchaser*], to the said [*vendor*] on the execution of these presents, the receipt of which said sum of £—— and also of the said sum of £——, the consideration for the said copyhold hereditaments, (making together the said entire price of £——,) the said [*vendor*] hereby acknowledges, and therefrom hereby releases and discharges the said [*purchaser*], his heirs, executors, administrators and assigns, The said [*vendor*], in execution of the aforesaid power given to him by the said recited indentures, and of every other power enabling him in this behalf, *and to the intent that these presents may operate preferably by way of appointment*, Doth direct and appoint (79) that all the freehold messuage or

Testatum.

Consideration.

Operative part of appointment.

Covenant to surrender copyholds.

(78) The conveyance of the freehold estate contains not unfrequently a covenant to surrender the copyhold estate, but the surrender is usually a contemporaneous act. It seems better to omit the covenant, and to substitute the recital in the text. That plan seems advisable too with reference to the covenants for title.

Conveyance by appointment.

(79) As the appointee is *in* of the seisin created to serve the uses of the deed containing the power, and consequently, by title paramount to the ownership of the vendor, the superadded conveyance by lease and release, although generally adopted in practice, must be nugatory unless the appointment fail of effect. It is more beneficial to the purchaser to take under the appointment, inasmuch as it overreaches the estate of the vendor and his trustee to prevent dower, and confers a title discharged from his judgment debts. *Doe* d. *Wigan* v. *Jones*, 10 Barn. & C. 457, and 5 Mann. & R. But note, the judgment was *in invitum*, and see 1 Adolph. & Ell. 293. The only disadvantage is, that the covenants will not run with the land, but that is a matter of secondary importance. The power of appointment should always form part of the limitations to prevent dower, and even if the legislature should wholly (*suprà*, 140) remove the necessity for such limitations, the power should still be retained.

Effect of appointment with reference to judgment creditors.

tenement, closes and hereditaments hereafter described, Together with the rights, members and appurtenances thereunto belonging, shall henceforth remain and be To the only proper use of the said [*purchaser*], his heirs and assigns for ever, [*or, where the estate is to be conveyed to the uses to prevent dower*, To the uses hereinafter expressed concerning the same.]

AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said contract, so far as concerns the said freehold hereditaments, and for the consideration lastly hereinbefore expressed, The said [*vendor*] *by way of auxiliary or secondary assurance*, Hath granted, bargained, sold and released, and by these presents Doth grant, bargain, sell and release unto the said [*purchaser*], his heirs and assigns, (in the actual possession of the said [*purchaser*], now being by virtue of a bargain and sale made to him by the said [*vendor*], in consideration of *5s.* by indenture bearing date the day next before the day of the date of these presents, for one year computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession,) The freehold hereditaments, (namely) [*freehold parcels*], Together with all following the rights, members and appurtenances thereunto belonging, And also all the estate, right, title, interest, claim and demand of the said [*vendor*] in, to or upon the said freehold hereditaments and premises, with their appurtenances, And also all deeds, papers and writings in his custody or power relating to his title to the same hereditaments and premises, or any part thereof, either solely or together with other hereditaments belonging to him of less value. TO HAVE AND TO HOLD the said freehold messuage, closes, hereditaments and premises hereby released or otherwise assured or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns for ever, To the only proper use of the said [*purchaser*], his heirs and assigns for ever, [*or, where the estate is to be conveyed to uses to prevent dower*, To such uses, upon such trusts, and in such manner as the said [*purchaser*] shall by any deed or deeds appoint, and

2d TESTATUM.

Operative part of release.

Actual possession clause.

All estate, &c.

All deeds, &c.

HABENDUM.

To the purchaser in fee.

(*or*, to uses to prevent dower.)

in default of appointment, To the use of the said [*purchaser*] and his assigns for his life without impeachment of waste; and immediately after his decease, To the use of the said [*trustee*], his executors and administrators, during the life of the said [*purchaser*], In trust for him and his assigns; and on the determination of the estate lastly hereinbefore limited, To the use of the said [*purchaser*], his heirs and assigns for ever. [*For the form of a declaration excluding dower, see p.* 144, *suprà.*] And the said [*vendor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his heirs and assigns, That notwithstanding any act, matter or thing done or permitted by the said [*vendor*] to the contrary, the said [*vendor*] has in himself good right by these presents to release or otherwise assure the said freehold hereditaments and premises, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, [*or, if the conveyance be to the uses to prevent dower*, to the uses aforesaid], according to the true intent of these presents; and also that the said [*vendor*] had in himself, at the time of making the said recited surrender, good right thereby to surrender the said copyhold hereditaments and premises, with their appurtenances, to the use of the said [*purchaser*], his heirs and assigns, according to the true intent of the same surrender: And also that the said freehold and copyhold hereditaments and premises shall or may be peaceably held and enjoyed accordingly, without any eviction or interruption from or by the said [*vendor*], or any person or persons rightfully claiming or to claim through, under or in trust for him, Free from or by the said [*vendor*], his heirs, executors or administrators, kept indemnified against all former or other estates, rights, charges and imcumbrances created or occasioned by the said [*vendor*], or any person or persons claiming through, under or in trust for him, or by this act, default, privity or procurement. And, lastly, that the said [*vendor*], and every person rightfully claiming any estate, right, title or interest, in or to the said freehold or copyhold hereditaments or premises, or any part thereof respectively, though, under

Covenants by vendor,

—for right to release freeholds,

and to surrender copyholds,

—for quiet enjoyment,

—for freedom from incumbrances,

—for further assurance.

or in trust for him, will at any time or times hereafter, at the request and costs of the said [*purchaser*], his heirs or assigns, make, do and execute every such act, deed, conveyance or assurance for more effectually assuring the said freehold and copyhold hereditaments and premises respectively, or any part thereof, with their appurtenances, according to the true intent of these premises and the said recited surrender of even dates herewith respectively, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed. IN WITNESS, &c.

No. 22.

CONVEYANCE, *by* LEASE *and* RELEASE, *from Trustees for Sale to a Purchaser.—Mortgagees, and the Owner of the Equity of Redemption, concur.*—SURRENDER *of a Mortgage Term.* —ASSIGNMENT *of another Mortgage Term to attend the Inheritance.*(81)

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*heir of deceased mortgagee in fee*], of, &c. of the first part; [*executors of the same mortgagee*] of the second part; [*trustees for sale of the equity of redemption*], of, &c. of the third part; [*owner of the equity of redemption*], of, &c. of the fourth part; [*first mortgagee for years*], of, &c. of the fifth part; [*executors of second mortgagee for years*], of, &c. of the sixth part; [*purchaser*], of, &c. of the seventh part; [*trustee for purchaser to prevent dower*], of, &c. of the eighth part; and [*trustee for purchaser of term created by the first mortgage*], of, &c. of the ninth part; and [*largest purchaser*](82) of the tenth part. WHEREAS, by in- Parties. Recitals,

(81) This precedent is designed to embrace as many of the circumstances ordinarily occurring on the conveyance of an incumbered estate as can be conveniently brought together.

(82) The parties are arranged in the following order:—1. The owner of the legal inheritance. 2. The persons having equitable or beneficial in- Arrangement of parties.

—of conveyance by lease and release, to uses to prevent dower in favour of the present owner,

dentures of lease and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between [*parties*], The hereditaments hereinafter described, with their appurtenances, were limited To such uses, and for such estate or estates, in such proportions, and for such intents and purposes as the said [*owner*] should at any time, or from time to time, by any deed or deeds direct or appoint; And in default of such direction or appointment, To the use of the said [*owner*] and his assigns, for his life, without impeachment of waste; with remainder To the use of [*a trustee for owner to prevent dower*], his executors and administrators, during the life of the said [*owner*], Upon trust for the [*owner*] and his assigns; with remainder to the use of the said [*owner*], his heirs and assigns for ever. And Whereas, by an indenture of appointment and demise, bearing date the —— day of ——, in the year ——, and made between the said [*owner*] of the one part, and the said [*first mortgagee*] of the other part, the said hereditaments were appointed to the use of,(83) and demised unto, the said [*mortgagee*], his executors, administrators and assigns, for the term of 500 years from the day of the date thereof; subject to a proviso for making void the same term, on payment by the said [*owner*], his heirs, appointees, executors, administrators or assigns, unto the said [*first mortgagee*], his executors, administrators or assigns, of the sum of £——, with interest for the same, after the rate of five per cent. per annum, at the time and in manner therein mentioned; but in payment whereof default was made.(84) And Whereas, by another indenture of ap-

—of first mortgagee for years,

—of second mortgagee for years,

terests in the inheritance. 3. Persons possessed of chattel interests. 4. The relessee. 5. Trustees for the relessee.

Recital of appointment and demise.

(83) The appointment and demise are often blended in the same testatum, thus:—"The said —— doth direct, limit and appoint, grant, bargain, sell and demise *unto*," &c. Still the *effect* (and the recital in the text assumes to state the effect, and not to exhibit the form of the instrument) is an appointment of the *use*, and a demise of the *land*.

Recital that mortgage became absolute.

(84) The verbose recital, "And whereas the said sum of £—— was not

pointment and demise, bearing date the —— day of ——, in the year ——, and made between the said [*owner*] of the one part, and [*second mortgagee*] of the other part, the said hereditaments were appointed to the use of, and demised unto, the said [*second mortgagee*], his executors, administrators and assigns, for the term of 1000 years from the day of the date thereof; subject to the mortgage made by the lastly hereinbefore recited indenture, and subject also to a proviso for making void the same term of 1000 years, on payment by the said [*owner*], his heirs, appointees, executors, administrators or assigns, to the said [*second mortgagee*], his executors, administrators or assigns, of the sum of £——, with interest after the rate of five per cent. per annum, at the time and in manner therein mentioned, but in payment whereof default was made. AND WHEREAS the said [*second mortgagee*] died on or about the —— day of ——, in the year ——, having made and published his last will and testament in writing, bearing date the —— day of ——, in the year ——, and appointed the said [*executors of second mortgagee*], executors thereof, who proved the same on the —— day of ——, in the year ——, in the —— Court of ——. AND WHEREAS, by indentures of lease and appointment and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of appointment and release being made between the said [*owner*] of the one part, and the said [*mortgagee in fee*] of the other part, The said hereditaments were assured and limited by the said [*owner*] unto or to the use of the said [*mortgagee in fee*], his heirs and assigns, subject to the mortgages made thereof by the hereinbefore recited indentures of appointment and demise; and also subject to a proviso for redemption and reconveyance on payment by the said [*owner*], his heirs, appointees, executors, administrators or assigns, to the said [*mortgagee in fee*], his executors, administrators or assigns, of the sum of £——, with interest, after

—of death of second mortgagee—his will—probate,

—of mortgage in fee,

paid at the time appointed by the said recited indenture for payment thereof, by means of which the said term of —— years became absolute at law, nevertheless redeemable in equity," is nearly exploded.

the rate of £5 per cent. per annum, at the time and in manner therein mentioned, but in payment whereof default was made. And Whereas the said [*mortgagee in fee*] died on the —— day of ——, in the year ——, having made and published his last will and testament in writing duly executed for passing freehold estates, bearing date the —— day of ——, in the year ——, and appointed the said [*executors of mortgagee in fee*], executors thereof, who proved the same on the —— day of ——, in the year ——, in the —— Court of ——; but the said [*mortgagee in fee*] died intestate as to the legal estate (85) vested in him by virtue of the lastly herein-

—of death of mortgagee in fee—his will—probate,

(85) It would be well to insert in every will a devise of mortgage and trust estates. A short clause to this effect is sufficient:—"I devise all estates, as well real as personal, of which I am seised or possessed as mortgagee or trustee, unto and to the use of the said [*executors*], their heirs, executors, administrators and assigns respectively, subject to the equities and trusts affecting the same respectively, and, so far as I am beneficially interested, to be disposed of as part of my personal estate for the purposes of my will." As a general rule, mortgage and trust estates will not pass where the nature of the disposition is inconsistent with the supposition that the testator intended to include property not beneficially his own. *Lord Braybroke* v. *Inskip*, 8 Ves. 417. Thus, limitations in strict settlement, a trust for sale, a charge of legacies or debts, &c., will exclude mortgage and trust estates, however general and comprehensive the terms of the devise may be, unless such estates be expressly included. These are *indicia* which cannot be mistaken. But other circumstances of a less decisive character often give rise to questions of great nicety. The rule, though established by a very high authority, after much balancing of inconvenience, is unsatisfactory. In *Ex parte Brettel*, 6 Ves. 577, Lord Eldon held that a general devise of the testator's estate to A., his heirs, &c., to and for his and their own proper use and behoof, did not pass trust estates; but he afterwards disclaimed (8 Ves. 434) any reliance upon the words "to and for his and their own proper use and behoof:" yet it does not appear that there was any other ingredient in the case. It is clear that a mortgagee or trustee is legally competent, if so disposed, from malice or caprice, to put the legal estate into the fetters of a strict settlement, or disperse it in a thousand fractions among as many devisees. The Courts will not suppose such an intention, but if clearly expressed they cannot refuse to give it effect. Would equity mulct the estate of the testator with the costs of the reconveyance

Devises of mortgage and trust estates.

before recited indentures, and left the said [*heir*], his heir at law, surviving him. And Whereas, by indentures of lease, and appointment and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of appointment and release being made between the said [*owner*] of the first part, the said [*trustees for sale*] of the second part, and, &c. [*creditors or others for whose benefit the reciting conveyance is made*] of the third part, the said hereditaments were assured and limited (together with other hereditaments) by the said [*owner*] unto and to the use of the said [*trustees for sale*], their heirs and assigns, (subject to the mortgages made thereof by the several hereinbefore recited indentures,) Upon trust with all convenient speed to sell the same, either together or in parcels, by public auction or private contract, for such price or prices as could be reasonably obtained for the same; and to receive the money to arise from the sale thereof, and stand possessed of such money upon the trusts in the said indenture of appointment and release now in recital expressed; And the same indenture contains a declaration constituting the receipt of the said [*trustees for sale*] for money paid to them by a purchaser under the said trust for sale, an effectual discharge and exemption from responsibility in respect of the application thereof. And Whereas the said [*trustees for sale*], in execution of the trust for sale reposed in them by the hereinbefore lastly recited indenture, caused the hereditaments comprised in the same indenture to be put up for sale by public auction in —— lots, at ——, in —— aforesaid, on the —— day of —— last, at which sale the said [*purchaser*] became the purchaser of lot 1, consisting of the hereditaments hereinafter described, at the price of £——, And Whereas the said sum of £—— remains owing to the said [*first mortgagee*], upon his said recited mortgage security, but all interest for the same has been paid to him up to the day of the date of these presents, as he hereby acknowledges. And Whereas the said sum of £—— remains owing to the said [*executors of second mortgagee*], upon the

—of conveyance, by appointment, and lease and release, of the equity of redemption in fee, to trustees upon trust to sell,

—with power to give receipts to purchasers,

—of sale by auction pursuant to the last deed,

—of monies due on first,

—second,

said recited mortgage security of their said testator [*second mortgagee*], deceased, but all interest for the same has been paid to them up to the day of the date of these presents, as they hereby acknowledge. AND WHEREAS the said sum of £—— remains owing to the said [*executors of mortgagee in fee*], upon the said recited mortgage security of their said testator [*mortgagee in fee,*] deceased, but all interest for the same has been paid to them up to the day of the date of these presents, as they hereby acknowledge. NOW THIS INDENTURE WITNESSETH, that in completion of the purchase aforesaid, and in consideration of the sum of £——, of lawful British money paid by the said [*purchaser*], with the approbation of the said [*owner*], on the execution of these presents, in manner following, (namely) first, the sum of £——, part thereof, to the said [*first mortgagee*], in satisfaction of all moneys now owing to him upon his said recited mortgage security, the receipt of which sum the said [*first mortgagee*] hereby acknowledges, and therefrom releases and discharges the said [*purchaser*], and also the said [*owner*] respectively, and their respective heirs, executors, administrators and assigns; secondly, the sum of £——, further part thereof, to the said [*executors of second mortgagee*], in full satisfaction of all moneys now owing to them upon the said recited mortgage security of their said testator [*second mortgagee*], deceased, the receipt of which sum the said [*executors of second mortgagee*] hereby acknowledge and therefrom release and discharge the said [*purchaser*], and also the said [*owner*] respectively, and their respective heirs, executors, administrators and assigns; thirdly, the sum of £——, further part thereof, to the said [*executors of mortgagee in fee*], in satisfaction of all moneys now owing to them on the said recited mortgage security of their said testator, [*mortgagee in fee*], deceased, the receipt of which sum the said [*executors of mortgagee in fee*], hereby acknowledge and therefrom release and discharge the said [*purchaser*], and also the said [*owner*] respectively, and their respective heirs, executors, administrators and as-

—and third mortgages.

TESTATUM.

Consideration.

signs; And fourthly, the sum of £——, the residue thereof to the said [*trustees for sale*], as trustees of the said recited indenture of the —— day of ——, The payment in manner aforesaid of which said sum of £——, being in full for the purchase of the fee simple in possession of the said hereditaments, the said [*trustees for sale*], and also the said [*owner*], hereby admit, and therefrom hereby respectively release and discharge the said [*purchaser*], his heirs, appointees, executors, administrators and assigns; and in consideration of 10*s.* at the same time paid by the said [*purchaser*] to the said [*heir*], the receipt whereof is hereby acknowledged, The said [*heir*], in respect only of his legal estate as heir at law of the said [*mortgagee in fee*], deceased,—And the said [*trustees for sale*], in respect only of their estate and interest (86) as trustees of the said recited indenture of the —— day of ——, Have respectively bargained, sold and released, And by these presents Do respectively bargain, sell and release, And the

(86) In fact a trustee for sale of an *equitable* ownership has no estate or interest,—no *estate*, because *that* supposes a legal property in the subject,—no *interest*, because *that* supposes a beneficial right to enjoy the profits. He has merely an office or a duty to discharge in respect of the land, with a right, as ancillary to its discharge, to call for a conveyance of the legal estate on satisfaction of the purposes for which it has been departed with. Although, in strictness, therefore, he has in him nothing descendible or devisable, yet it is conceived that the office would pursue the same course of devolution as if it were annexed to the legal fee, and consequently that the heir or devisee, on whom that fee, if vested in the trustee, would devolve, is the proper person to execute the trust. But this difficulty presents itself—the office may devolve upon an infant or other incapacitated person. As there is clearly no legal estate to be conveyed, the case is entirely without the 8th section of the act of 1 Will. 4, c. 60, and it should seem that cases which are without that section cannot generally be brought within the 22d section of the same act, enabling the Court to appoint new trustees upon petition. In this dilemma there is no other course open than to file a bill. It should be added, that if an *equitable* owner convey to A. simply in trust for B., A. is a mere cipher, having neither estate, interest nor office, and he may, therefore, be laid out of the title.

Trustee of an *equity*.

Devolution of the *office* of trustee.

said [*executors of mortgagee in fee*], as executors of the said [*mortgagee in fee*], HAVE remised, released and quit-claimed, And by these presents Do remise, release and quit-claim, And the said [*owner*] Hath granted, bargained, sold, released and confirmed, And by these presents Doth grant, bargain, sell, release and confirm, " And in order to merge the said term of 1000 years, (87) the said [*executors of second mortgagee*], by the direction of the said [*trustees for sale and owner*] Have surrendered and yielded up, And by these presents Do surrender and yield up," unto the said [*purchaser*], his heirs and assigns, (in the actual possession of the said [*purchaser*], now being by virtue of a bargain and sale (88) made to him by the said [*heir, trustees for sale, and owner*], in consideration of *5s.* a piece, by indenture bearing date the day next before the day of the date of these presents, for one year, computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession,) ALL [*parcels*], Together with all buildings, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, profits, privileges, easements, rights, members and appurtenances whatsoever, to the said hereditaments and premises, or any part thereof belonging or appertaining. And also all the estate, right, title, interest, claim and demand of the said parties hereto, of the first, second, third, fourth " and sixth" parts respectively, in, to, out of or upon the said hereditaments and premises, and every part thereof, with their appurtenances. And also all deeds and writings concerning the title to the said hereditaments or any part thereof, alone or together with other hereditaments of less value now in their or any of their cus-

Operative words.

Actual possession clause.

Parcels.

All estate, &c.

Deeds, &c.

Surrender of term in conveyance of fee.

(87) It seems more correct and consistent, in point of form, to surrender the term by a separate testatum, after the conveyance of the reversion in fee to the purchaser. If the words within inverted commas be retained, the second testatum must be omitted, *et è converso*.

Grant of fee expectant on mortgage term.

(88) As the fee is in reversion, expectant on the mortgage terms, it would pass by way of grant, without a lease for a year. *Suprà*, n. (72).

tody, or which they or any of them can procure without suit.

To HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments and premises hereby released, or otherwise assured or intended so to be, with their appurtenances, unto the said [*purchaser*] and his heirs, To such uses for such estates, and in such manner as the said [*purchaser*] shall, at any time or from time to time, by any deed or deeds appoint, And in default of such appointment, To the use of the said [*purchaser*] and his assigns, during his life, without impeachment of waste. And immediately after the determination of that estate, by any means in his lifetime, To the use of the said [*dower trustee*], his executors and administrators, during the life of the said [*purchaser*], Upon trust, nevertheless, for the said [*purchaser*] and his assigns, And immediately after the determination of the said estate hereby limited to the said [*dower trustee*], his executors and administrators, To the use of the said [*purchaser*], his heirs and assigns for ever. [*For the form of a declaration excluding dower, see p.* 144, *suprà.*] "AND THIS INDENTURE FURTHER WITNESSETH, that in consideration of the said sum of £——, so paid to the said [*executors of second mortgagee for years*] as aforesaid, The said [*same executors*], by the direction of the said [*trustees for sale and owner*], Have surrendered and yielded up, And by these presents Do surrender and yield up unto the said [*purchaser*], All the said messuages or tenements, lands, hereditaments and premises comprised in the secondly hereinbefore recited indenture of appointment and demise, with the rights, members and appurtenances thereunto belonging. And all the estate, right, title, term and interest of the said [*same executors*], in or to the same premises, To THE INTENT that the residue of the said term of 1000 years may merge and be extinguished in the immediate reversion vested in the said [*purchaser*], under the conveyance and assurance thereof hereinbefore contained. And the said [*heir, executors of mortgagee in fee, executors of second mortgagee, and trustees for sale*], (so far only as concerns their respective

HABENDUM.

Uses to prevent dower.

FURTHER TESTATUM.

Surrender of term by executors of second mortgagee.

Operative words.

All estate, &c.

Intent that term shall merge.

Covenants by conveying parties (except owner) that they have not incumbered.

acts, deeds and defaults, (89)) for themselves respectively, and their respective heirs, executors and administrators, hereby severally covenant with the said [*purchaser*], his heirs and assigns, that the said [*covenantors*] respectively have not done or permitted any act, matter or thing, by which the said hereditaments and premises hereby released or otherwise assured, or intended so to be, or any part of the same, with their appurtenances, are, is, or shall be aliened, incumbered or otherwise prejudicially affected. And the said [*owner*], for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his heirs and assigns, that notwithstanding any act, matter or thing done or permitted by the said [*owner*], or any person or persons rightfully

Covenants by owner,

Covenant against incumbrances.

(89) The covenant against incumbrances is the most frequent of all covenants, being commonly entered into by every person who conveys, releases, surrenders, or confirms, in respect of any estate, right or interest, not having contracted any obligation, express or implied, to guarantee the title, except so far as it may be affected by his individual acts. This, therefore, is the covenant proper to assurances by trustees, mortgagees, executors and others joining in a fiduciary character, as well as by heirs at law and others voluntarily perfecting or confirming the title. Yet the precise form of the covenant is not settled by general consent. Where several covenant by the same clause, various modes are adopted for restricting the covenant of each to his own acts. The following form appears to be the most correct:—"And the said [*covenantors*], so far only as concerns their own *respective* acts and defaults, for themselves *respectively*, and their *respective* heirs, executors and administrators, hereby *severally* covenant with the said [*covenantee*], his heirs and assigns, that the said [*covenantors*] *respectively*, have not done," &c. But this form is sometimes objected to by the scrupulous practitioner, who prefers the following more ordinary form. "And *each* of them, the said [*covenantors*], so far only as concerns *his* own acts and defaults, for *himself*, his heirs, executors and administrators hereby severally covenants with the said [*purchaser*], his heirs and assigns, that *they*, the said [*covenantors*], have not nor have or has *any* of them done," &c. Accuracy requires the substitution of the words, "that *he*, the covenanting party, has not," &c. instead of the words, "they, the said [*covenantors*], have not, nor have nor has any of them."

claiming through or under him (90) to the contrary, the parties (91) by whom the conveyances and assurances hereinbefore contained are expressed to be made, or some of them, now have in themselves, or one of them now has in himself, good right by means thereof, to assure and limit the inheritance in fee simple, of and in the said messuages or tenements, lands, hereditaments and premises hereby released or otherwise assured, with their appurtenances, to the uses and in manner aforesaid: And also that the said hereditaments and premises, with their appurtenances, and the rents and profits thereof, shall or may, at all times hereafter, be peaceably and quietly held, received and enjoyed accordingly (92) without any eviction or denial from or by the said (93) [*owner*], or any person or persons rightfully claiming or to claim through, under or in trust for him, Free and clear, or by the said [*owner*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges and incumbrances, created or occasioned by the said (94) [*owner*], or any person or

—for right to convey,

—for quiet enjoyment,

—for freedom from incumbrances,

(90) Instead of the words "any person or persons," &c. it is usual to insert here the names of all the conveying parties, but where all the persons to whose acts the covenants are meant to extend, derive title through the covenantor, they may be comprehended under the above words. Indeed, the words, "notwithstanding any act, &c. done or permitted by the covenantor," are in themselves sufficient, inasmuch as his mortgagees, &c. are *in* under his act, &c. Covenants for title.

(91) The common form of covenant is, "And also that the said [*naming again all the conveying parties,*] now have in themselves, &c. by these presents good right," &c.

(92) The common form runs thus:—"And also that it shall be lawful for the said [*purchaser*], his appointees, heirs and assigns, at all times, &c. to enter into or upon, and hold and enjoy the said messuage, &c. and take the rents, issues and profits thereof, without," &c.; but the form given in the text appears to be preferable.

(93) In this place the names of all the conveying parties are commonly inserted. But see note (90) *suprà*.

(94) Note (90) *suprà* applies here.

persons claiming or to claim through, under or in trust for him, or by his act, default, privity or procurement. (95) And also that the said (96) [*owner*], and every person rightfully claiming or to claim any estate, right, title or interest, in or to the said hereditaments and premises, or any part thereof, with their appurtenances, through, under or in trust for him, will at any time or times hereafter, at the request and at the costs and charges of the said [*purchaser*], his appointees, heirs or assigns, do, execute and perfect every such act, deed, conveyance or assurance, for more effectually assuring the said hereditaments and premises, or any part of the same, with the appurtenances, To the use aforesaid, or otherwise according to the direction of the said [*purchaser*], his appointees, heirs or assigns, as by him or them, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed. AND THIS INDENTURE FURTHER WITNESSETH, that in consideration of the said sum of £—— so paid to the said [*first mortgagee*] as aforesaid, The said [*first mortgagee*], by the direction of the said [*trustees for sale and owner*], and on the nomination of the said [*purchaser*] Hath bargained, sold and assigned, and by these presents Doth bargain, sell and assign, unto the said [*trustee of term*], his executors, administrators and assigns, All the said messuages or tenements, lands, hereditaments and premises comprised in the hereinbefore first recited indenture of appointment and demise, and also expressed to be comprised in the conveyance and assurance hereinbefore contained, together with the rights, members and appurtenances thereunto belonging. And also all the estate, right, title, term and

—and for further assurance.

FURTHER TESTATUM.

Assignment of term by first mortgagee.

Consideration.

Operative words.

All estate, &c.

Exception of incumbrances.

(95) The term of 1000 years, though assigned to attend the inheritance, is at law an incumbrance, and as such ought, perhaps, to be excepted here. But it is not usual to except attendant terms, as incumbrances, especially where they are assigned by a separate deed.

(96) Note (90), *supra*, applies here.

interest of the said [*first mortgagee*], in or to the same premises, To HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments and premises hereby assigned or intended so to be, with their appurtenances, unto the said [*trustee of term*], his executors, administrators and assigns, henceforth for the residue now unexpired of the said term of 500 years, In trust, nevertheless, to be disposed of by the said [*trustee of term*], his executors, administrators and assigns, as the said [*purchaser*], his appointees, heirs or assigns shall direct, and in the meantime to permit the same term to attend the inheritance of the same premises, according to the uses hereinbefore limited thereof, in order to protect the same from mesne charges and incumbrances, if any. And the said [*first mortgagee*], for himself, his heirs, executors and administrators, hereby covenants with the said [*trustee of term*], his executors, administrators and assigns, that the said [*first mortgagee*] has not done or permitted any act, matter or thing by which, or by means of which, the said hereditaments and premises hereby assigned, or intended so to be, or any part of the same, with their appurtenances, are, is, or shall be aliened, incumbered, or otherwise prejudicially affected. AND WHEREAS the deeds and writings specified in the schedule hereunder written relate to the title as well of the said hereditaments and premises hereby released or otherwise assured, or intended so to be, as of certain other hereditaments of greater value, forming lot —— at the aforesaid sale by auction, and purchased at such sale by the said [*largest purchaser*]. And WHEREAS, in pursuance with one of the conditions of the said sale, the said deeds and writings have been delivered to the said [*largest purchaser*], as the largest purchaser in value. NOW THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said condition, the said [*largest purchaser*], for himself, his heirs, executors, administrators and assigns, hereby covenants with the said [*purchaser*], his appointees, heirs, and assigns, that the said [*largest purchaser*], his heirs

HABENDUM.

Upon trust to attend the inheritance.

Covenant by assignor that he has not incumbered.

RECITALS,

—that deeds, &c. in schedule relate to other property of greater value,

—of delivery of deeds, &c. to largest purchaser.

FURTHER TESTATUM.

Covenant by largest purchaser to produce deeds, &c.

or assigns, (unless prevented by inevitable accident), will, at any time, or from time to time, at the request in writing, and at the costs of the said [*purchaser*], his appointees, heirs, or assigns, produce or cause to be produced, in England, unto the said [*purchaser*], his appointees, heirs or assigns, or his or their attorney, solicitor, agent or counsel, or before any court or courts of law or equity, or upon any commission for the examination of witnesses, or otherwise as occasion shall require, the said deeds and writings, or any of them, in manifestation or defence of the title of the said [*purchaser*], his appointees, heirs or assigns, to the said hereditaments and premises hereby released or intended so to be, or any part thereof, And at the like request and at the costs of the said [*purchaser*], his appointees, heirs or assigns, furnish him or them with true copies or extracts of the said deeds and writings, such copies or extracts to be attested, if required. IN WITNESS, &c.

and to furnish copies, &c.

[*See Schedule*, p. 317.]

THE SCHEDULE

To which the above written Indenture refers.(97)

Date of Document.	Nature of Document.	Names and Descriptions of Parties.
1st and 2d days of Jan. 1833.	Indentures of lease and release.	Lease between A. B., of &c. of the one part, and C. D., of, &c. of the other part, &c. Release between the said A. B., of the first part; the said C. D., of the second part; and E. F., of, &c. of the third part.
Trinity Term, 1833.	Exemplification of recovery suffered in the Common Pleas at Westminster, pursuant to the last-mentioned indenture of release.	A. B., gent., demandant, C. D., gent., tenant, E. F. Esq. vouchee, who vouched over the common vouchee.
1st July, 1833.	Indenture of demise by way of mortgage.	Between, &c.
Trinity Term, 1833.	Indentures of fine levied in the Common Pleas, pursuant to the last-mentioned indenture.	A. B. Esq. and C. his wife ond others, conusors, and E. F., gent., conusee.
1st August, 1833.	Probate [*or* office copy] of will of this date.	Of A. B., of, &c.
1st and 2d Sept. 1833.	Attested copies of indentures of lease and release of these dates.	The lease between A. B. of, &c. The release between the said A. B., &c. (being a settlement in contemplation of the marriage of the said A. B. with the said C. D.)
1st October, 1833.	Deed poll of appointment.	By A. B., of, &c.

(97) The schedule should contain all the documents of title delivered to the covenantor, including official and attested copies, pedigrees, certificates, copies of registry, &c. unless the covenantee is furnished with similar copies, &c., and a memorandum of the covenant for production should be endorsed on one or more of the principal scheduled deeds. Schedule of deeds.

No. 23.

CONVEYANCE *by* APPOINTMENT *and* LEASE *and* RELEASE *of Freeholds, and by* BARGAIN AND SALE (98) *of Copyholds under a Fiat in Bankruptcy* (99).

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, between [*creditors' assignees*] of, &c. of the

(98) See note (60) *suprà*.

Conveyances under Bankrupt Acts.

(99) In framing the conveyance of a bankrupt's estate, the Bankrupt Court Act, 1 & 2 Will. 4, c. 56, as well as the general Bankrupt Act, 6 Geo. 4, c. 16, should be kept in view with reference chiefly to the following points: —1. Instead of a *commission* under the great seal, there now issues a *fiat* under the hand of the Lord Chancellor (1 & 2 Will. 4, c. 56, s. 12), but the persons appointed to execute the fiat are still called commissioners. 2. The choice of (the non-official) assignees takes place at the first of the two meetings of creditors appointed for the bankrupt to surrender, (ib. s. 20). 3. All the personal estate of the bankrupt, and such real estate of the bankrupt as by the act, 6 Geo. 4, c. 16, is directed to be conveyed by the commissioners *to the assignees*, are vested in "the bankrupt's assignee or assignees for the time being by virtue of his or their appointment" alone, (ib. s. 25 & 26; as to commissions *prior* to 1 & 2 Will. 4, c 56—*Smith* v. *De Tastet*, Montagu & Ayrton, 370.) 4. In every town fiat, an official assignee is added to the assignees chosen by the creditors, (ib. s. 22); and such official assignee is directed to possess and secure the personal estate, the rents of the real estate, and the proceeds of the sale of both the real and personal estate. (ib. ib.) Until the choice of assignees by the creditors, the official assignee is competent to act as sole assignee, (ib. ib.) It follows that upon a sale, under a town fiat, the purchase-money must be paid to the official assignee; but after a choice of assignees by the creditors, the judgment and discretion relating to the sale are confided to such assignees exclusively, (ib. s. 23). 5. By the act, 6 Geo. 4, c. 16, s. 68, the commissioners are directed, (instead of conveying to the assignees) by deed indented and enrolled in any of his majesty's courts of record, to make sale of the bankrupt's copyholds, and thereby to entitle or authorise any person on their behalf to surrender the same; consequently copyholds are not vested in the assignees by virtue of their appointment, but the power of making sale and entitling a person to surrender must be exercised, in the instance of a country commission or fiat, by the country commissioners, and, in the instance of a town commission or fiat, by the commissioners of the Bankrupt Court. By *make sale*, however, we are to

first part; [*official assignee*] of, &c. of the second part; [*commissioner or commissioners*], of the third part; [*bankrupt*] of, &c. of the fourth part; [*purchaser*] of, &c. of the fifth part; [*trustee for purchaser to prevent dower*] of, &c. of the sixth part; and [*a person appointed to surrender copyholds*] of the seventh part. WHEREAS by indentures of lease and release bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between, &c. the freehold hereditaments hereinafter described, with their appurtenances, were limited to such uses as the said [*bankrupt*] should by any deed or deeds direct or appoint, and in default of such direction or appointment, To the use of the said [*bankrupt*] and his assigns for his life, without impeachment of waste, with remainder To the use of the said [*trustee for bankrupt*] and his heirs during the life of the said [*bankrupt*], in trust for him and his assigns, with remainder To the use of the said [*bankrupt*], his heirs and assigns. AND WHEREAS at a court baron held for the manor of ——, in the county of ——, on the —— day of ——, in the year ——, the said [*bankrupt*] was admitted tenant of the copyhold hereditaments hereinafter described, to hold to him and his heirs at the will of the lord,

RECITALS,

—of indentures of lease and release, limiting freeholds to the uses to prevent dower in favour of the bankrupt,

—of the bankrupt's admission to copyholds,

understand *convey*, for the creditors' assignees are the proper persons to conduct the sale, and the commissioners are merely instruments to give effect, by a legal alienation, to the contract of the assignees. But where the bankrupt is not tenant to the lord, there is no necessity for resorting to the commissioners, since the assignees may sell the equitable interest, and the legal tenant may surrender by their direction to the purchaser. The clauses relating to copyholds in the act 6 Geo. 4, c. 16, are not very lucid. It should be observed, that by neither of these acts is the general practice in bankruptcy disturbed; so that, for example, if a creditor, holding a mortgage or other security, is desirous of having his pledge sold and of being admitted to prove for the deficiency, the sale must be made in conformity to Lord Loughborough's order of 8th March, 1794. See *Ex parte Aple*, Mont. & Ayrton, 631. That order does not enable a first incumbrancer, without power of sale, to enforce a sale against a subsequent incumbrancer, who has a right to stand upon his security until foreclosed. *Ex parte Jackson*, 5 Ves. 357.

—of the issuing of a fiat [or commission] in bankruptcy,

according to the custom of the said manor. And Whereas a fiat in bankruptcy, under the hand of the Lord Chancellor of England, bearing date the —— day of ——, in the year ——, was issued against the said [*bankrupt*], who was thereupon adjudged a bankrupt. And Whereas the said [*assignees*] are the assignees chosen by the creditors of the estate and effects of the said bankrupt, and the said [*official assignee*] is the official assignee of the estate and effects of the said bankrupt, and the said [*commissioner*] is the commissioner of the court of bankruptcy acting in the execution of the said fiat [*or*, are the major part of the commissioners acting in the execution of the said commission], and are respectively parties to and join in these presents in their respective characters aforesaid, and not otherwise.(100) And Whereas the said [*assignees*] have contracted with the said [*purchaser*] for the absolute sale to him of the freehold and copyhold hereditaments hereinafter described, with their appurtenances, free from incumbrances, at the entire price of £——. And whereas, &c. [*apportionment* (101) *of the price as in* No. 21, *suprà*.] Now this Indenture Witnesseth, that in pursuance of the said contract, so far as concerns the said freehold hereditaments, and in consideration of the sum

—that parties of the first, second and third parts are respectively creditors' assignees, official assignee, and commissioner, and join in those characters,

—of contract for sale of freeholds and copyholds; and apportionment of price.

Testatum.

Consideration.

(100) This declaration renders it unnecessary afterwards to append to the names of the assignees, &c. the qualifying expression, "as such assignees as aforesaid," &c.

Stamp on sale of bankrupt's copyholds.

(101) The Stamp Act, 55 Geo. 3, c. 184, Schedule, part 1, title "Conveyance," provides "that where any copyhold estate shall be conveyed by a deed of bargain and sale by the commissioners named in a commission of bankrupt, or by executors and others by virtue of a power given in a will, or by act of parliament or otherwise, where a *surrender* shall *not* be necessary, the deed of bargain and sale shall be deemed (with reference to the ad valorem stamp) the principal instrument." But we have seen, (*suprà*, n. 99,) that under the Bankrupt Act, 6 Geo. 4, c. 16, a *surrender*, in addition to the bargain and sale and deed enrolled, *is* necessary. The officer, however, has refused to enrol the deed until stamped with the ad valorem stamp, alleging that the copyholds passed by the deed.

of £——, of lawful British money, being such part of the said entire price as on the apportionment thereof between the said freehold and copyhold hereditaments has been attributed to the said freehold hereditaments, paid by the said [*purchaser*] to the said [*official assignee*], at or before the execution of these presents, the receipt of which said sum the said [*official assignee*] hereby acknowledges, and from the same sum hereby releases and for ever discharges the said [*purchaser*], his heirs, executors, administrators and assigns. And also in consideration of 10*s.* at the same time paid by the said [*purchaser*] to the said [*bankrupt*], the receipt whereof is hereby acknowledged, The said [*assignees, cred. & off.*], by virtue of all powers and authorities vested in or given to the said [*bankrupt*], and which they are competent to exercise (102) do direct, limit and appoint, And

Creditors' assignees and bankrupt appoint.

(102) The Bankrupt Act, 6 Geo. 4, c. 16, s. 77, enables the assignees to execute all powers vested in the bankrupt which he might have legally executed for his own benefit, except the right of nominating to a benefice. A question sometimes arises as to the effect of bankruptcy where property is subject to the joint appointment of the bankrupt and his wife, and in default of appointment, is limited to the bankrupt for life, with remainders over. It is an established principle, founded on natural reason and justice, that if a man having a power, and also an interest ulterior to the power, aliens his interest, without exercising his power, he shall not afterwards be permitted to exercise the power in prejudice of his own alienation. *Long* v. *Rankin*, Sugd. Pow., 5th ed. App. No. 5. The principle holds equally if the power is given to himself and another jointly;—he cannot afterwards concur with the co-donee in defeating his own act. So, the bankruptcy, though a general, and perhaps involuntary, alienation, operates to preclude the bankrupt from concurring with his wife in executing the power. The assignees cannot concur in its exercise, because the power was not such "as he (alone) could have legally executed for his own benefit;" the bankrupt cannot concur, because his concurrence would defeat the interest of his creditors claiming under his alienation in bankruptcy. As the alienation, by one of several donees of a joint power, of an interest limited to him ulterior to the power is thus equivalent to a release of the power *pro tanto*, it follows, first, that one of several donees of a joint power may release it by deed; secondly, that he may release it in respect only of some particular estate or interest, so as to take that estate or interest out of the operation of the power.

Effect of bankruptcy on powers of appointment.

also the said [*bankrupt*], by virtue of all powers and authorities vested in or given to him, Doth direct, limit and appoint to the uses hereinafter expressed (103). And the said [*assignees, cred. & off.*] Have and every of them Hath bargained, sold and released, and by these presents Do and each of them Doth bargain, sell and release, And the said [*bankrupt*] Hath granted, bargained, sold, released, ratified and confirmed, And by these presents Doth grant, bargain, sell, release, ratify and confirm unto the said [*purchaser*], his heirs and assigns (in the actual possession of the said [*purchaser*], now being, by virtue of a bargain and sale made to him by the said [*assignees, cred. & off. and bankrupt*], in consideration of *5s.* a-piece, by indenture bearing date the day next before the day of the date of these presents, for one year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), All [*freehold parcels*], Together with all the rights, members and appurtenances to the said hereditaments and premises belonging. And also all the estate, right, title and interest of the said [*assignees, cred and off. and bankrupt*], respectively in or to the said hereditaments and premises, with their appurtenances. And also all deeds and writings relating to the title to the said hereditaments and premises, or any part thereof, either alone or together with any other hereditaments of less value now in the custody or possession of the same parties or any of them. To HAVE AND TO HOLD the said messuages or tenements, hereditaments and premises hereby released or otherwise assured or intended so to be, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, To such uses, upon such trusts and in such manner as the said [*purchaser*], shall, by any deed or deeds,

And creditors' assignees release.

And bankrupt confirms.

Actual possession clause.

Parcels.

All estate, &c.

All deeds, &c.

HABENDUM.

To such uses as purchaser shall appoint, in default of appointment to him in fee.

Appointment to uses.

(103) It is more accurate to appoint thus, "to the uses," &c.; but if these words were omitted, the appointment would still be applied, in construction, directly to the uses; see *Wynne* v. *Griffith*, 3 Bing. 179; 5 Barn. & C. 923; 1 Russ. 283.

appoint, And in default of appointment, (104) To the use of the said [*purchaser*], his heirs and assigns for ever. AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said contract, so far as concerns the said copyhold hereditaments, and in consideration, &c. the receipt, &c. [*state the consideration for the copyholds and the receipt, &c. as in the former testatum*], The said [*commissioner*] Hath bargained and sold, and by these presents Doth bargain and sell, And the said [*assignees, cred. & off.*], Have remised, released and quit-claimed, and by these presents Do remise, release and quit-claim, And the said [*bankrupt*] Hath ratified and confirmed, and by these presents Doth ratify and confirm unto the said [*purchaser*], his heirs and assigns, All [*copyhold parcels*], Together with, &c, and also all the estate, &c. TO HAVE AND TO HOLD the said copyhold pieces or parcels of land, hereditaments and premises hereby bargained and sold or intended so to be, with the appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor, by the rents, suit and services therefore due and accustomed. And the said [*commissioner*] Doth hereby entitle and authorise the said [*person to surrender*], at the next or any susequent court baron to be held for the said manor, or out of court, as soon as may be, to surrender into the hands of the lord of the said manor, according to the custom thereof, the said copyhold pieces or parcels of land, hereditaments and premises hereby bargained and sold or

FURTHER TESTATUM. Consideration.

Appointment by commissioner of a person to surrender the copyholds.

(104) Even if limitations to prevent dower should be rendered wholly (*suprà*, 140,) unnecessary by the legislature, the power of appointment should still be retained, on account of the facilities which it affords for acting on the ownership by a simple instrument, and for conferring a title unaffected by the judgment debts (*suprà*, n. 79,) of the appointor. It should be observed, that an execution of the power over-reaches dower attaching on the fee vested in the purchaser previously to the appointment. *Moreton* v. *Lees*, Sugd. Pow. 5th ed. 350; *Ray* v. *Pung*, 5 Barn. & Ald. 561; 5 Madd. 310.

Utility of the power of appointment in uses to prevent dower.

intended so to be, with their appurtenances, To the use of the said [*purchaser*], his heirs and assigns, at the will of the lord, according to the custom of the said manor, by the rents, suit and services therefore due and accustomed. And each of them the said [*creditors' assignees*], (so far only as concerns his own acts and defaults), for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his heirs and assigns, that he (the covenanting party) has not done or permitted any act, matter or thing by which the said freehold and copyhold hereditaments and premises respectively, or any part thereof respectively, are, is, shall or may be aliened, charged or prejudicially affected (105). IN WITNESS, &c.

Covenant by creditors' assignees against incumbrances.

Mortgages.

No. 24.

MORTGAGE *in Fee, by* APPOINTMENT *and* LEASE *and* RELEASE, *with Power of Sale.* (106).

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*mortgagor*], of, &c. of the one part, and [*mortgagee*], of, &c. of the other part. WHEREAS by virtue of Indentures of Lease and Release, dated respectively the —— and —— days of ——, in the year 18—,

Parties.

RECITALS.

Covenants by bankrupt for title.

(105) The bankrupt is not compellable to enter into covenants for title, nor indeed to join in the conveyance. If he should be willing to covenant, here may be added covenants similar to those in No. 22, *suprà*. But the act, 6 Geo. 4, c. 16, s. 78, authorises the Chancellor, on the petition of the assignees or purchaser, to order the bankrupt to join in the conveyance, and on his non-compliance, gives to the order the effect of a conveyance by him.

Concise mortgage in fee.

(106) This precedent exhibits a concise example of a mortgage in fee with power of sale, framed, for the most part, according to the ordinary forms. The points arising upon these forms are fully considered in the annotations to No. 26, *infrà*.

the Indenture of Release being made between, &c. the fee-simple in possession of the hereditaments hereafter described, stands limited To such uses as the said [*mortgagor*] shall by any deed or deeds appoint; And in default of such appointment, To the use of the said [*mortgagor*] and his assigns for his life, without impeachment of waste, with remainder To the use of the said [*a trustee to prevent dower*], his executors and administrators, during the life of the said [*mortgagor*], upon trust for the said [*mortgagor*], and his assigns, with remainder To the use of the said [*mortgagor*] his heirs and assigns for ever. AND WHEREAS the said [*mortgagee*] has, at the request of the said [*mortgagor*], agreed to lend to him the sum of £——, on having the repayment thereof, with interest, secured in manner hereinafter expressed: NOW THEREFORE THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— of lawful British money, paid by the said [*mortgagee*] to the said [*mortgagor*], on the execution of these presents, the receipt whereof the said [*mortgagor*] hereby acknowledges, and therefrom hereby releases the said [*mortgagee*], his heirs, executors, administrators and assigns, The said [*mortgagor*], in execution of the aforesaid power given to him by the said recited Indentures, and of every other power enabling him in this behalf, DOTH appoint that ALL the hereditaments hereinafter described, with their appurtenances, shall henceforth remain To the use of the said [*mortgagee*], his heirs and assigns for ever, subject as hereinafter is expressed. AND THIS INDENTURE FURTHER WITNESSETH, that for the consideration aforesaid, The said [*mortgagor*] HATH granted, bargained, sold and released, and by these presents Doth grant, bargain, sell and release unto the said [*mortgagee*], (in his actual possession now being by virtue of a bargain and sale thereof, made to him by the said [*mortgagor*] in consideration of *5s.* by Indenture dated the day next before the day of the date of these presents, for one year, computed from the day next before the day of the date of the said Indenture of Bargain and Sale, and by force of the

—of conveyance to mortgagor, to uses to prevent dower,

—of agreement for mortgage.

TESTATUM.

Consideration.

Mortgagor appoints.

FURTHER TESTATUM.

Mortgagor releases.

Actual possession clause.

statute for transferring uses into possession,) and to his heirs,

Parcels. ALL [*parcels*], Together with all the rights, members and

All estate, &c. appurtenances thereunto belonging. And also all the estate, right, title and interest of the said [*mortgagor*] in and to the said hereditaments and premises, And all deeds and writings relating to his title to the said hereditaments and premises, or

HABENDUM. any part thereof. TO HAVE AND TO HOLD the said hereditaments and premises hereby released or intended so to be,

To mortgagee in fee. with their appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, Nevertheless subject to, with and under the provisions hereinafter contained,

Proviso for redemption. (that is to say), PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators or assigns, shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators or assigns, the sum of £—— of lawful British money, with interest for the same after the rate of £—— per cent. per annum, on the —— day of —— next, without deduction, then immediately after such payment, the said [*mortgagee*], his heirs or assigns, shall, at the request and costs of the said [*mortgagor*], his heirs, executors, administrators or assigns, re-assure the said hereditaments and premises, (free from all incumbrances to be created by the said [*mortgagee*], his heirs or assigns, in the mean time,) to such uses as shall be subsisting or capable of effect by

Power of sale. virtue of the hereinbefore recited Indenture (107); PROVIDED ALSO, that if default (108) shall be made in payment of the said sum of £——, or the interest thereof, or any part thereof, at the time and in manner aforesaid, and the said [*mortgagee*], his executors, administrators or assigns, shall at any time afterwards give to the said [*mortgagor*], his heirs, executors, administrators or assigns, or any of them, or leave at his or their, or any of their, usual or last known place or places of abode in England, notice in writing of an intention to exercise this power of sale, then, unless the said sum of

(107) See notes to No. 26, *infrà*. (108) *Ib.*

£——, with all interest due for the same and all costs occasioned by the non-payment thereof, shall be paid at the end of six calendar months from the giving or leaving of such notice, it shall be lawful for the said [*mortgagee*], his heirs, [executors, administrators (109)] or assigns, at any time or times after the expiration of the said notice, without the necessity of the concurrence or consent of the said [*mortgagor*], his heirs or assigns, to sell the said hereditaments and premises, together or in parcels, by public auction or private contract, and subject or not subject to any special or other conditions or stipulations relative to the title or evidence of title or otherwise, as shall appear expedient, and with full power to purchase in the said hereditaments, or any part or parts thereof, at any auction, and also to rescind or vary the terms of any contract for sale, and to receive the money to arise from the sale or sales thereof, and out of the same money to retain and satisfy the said sum of £——, with all interest due for the same, and all costs and expenses occasioned by the non-payment thereof; And the surplus (if any) of the money so to arise as aforesaid, shall be paid (110) to the said [*mortgagor*], his heirs, executors, administrators or assigns (111). And the said [*mortgagor*] hereby directs that Receipt clause.

(109) See notes to No. 26, *infrà*. (110) *Ib.*

(111) If the mortgage is made subject to prior incumbrances, add a provision to this effect:— Power to pay off prior incumbrances.

" Provided also, and it is hereby further declared, " that it shall be lawful for the said [*mortgagee*], his heirs, executors, administrators or assigns, in the execution of the power of sale hereinbefore " contained, to sell the said several hereditaments comprised in the said " recited indentures of the —— day of ——, and the —— day of —— " respectively, either subject to or discharged from the respective mort- " gages thereby made, or either of them, and in case the same hereditaments " and premises respectively, or any part thereof, shall be sold discharged " from the said mortgages respectively, then to apply a competent part or " parts of the money to arise from the sale or sales of the same hereditaments " and premises, or of any other hereditaments and premises to be sold under " the power hereinbefore contained, in or towards payment and satisfaction " of such mortgage or mortgages, and that the said [*mortgagee*], his heirs,

every receipt which shall be given by the said [*mortgagee*], his heirs, executors, administrators or assigns, or his or their agent or agents, to any purchaser or purchasers under the power of sale hereinbefore contained, for his, her or their purchase-money, shall exonerate such purchaser or purchasers from all liability in respect of the application thereof, nor shall such purchaser or purchasers be obliged or concerned to inquire or take notice whether any sale or sales is or are necessary or proper for any of the purposes hereinbefore expressed, nor whether any such default has been made or notice given as aforesaid. PROVIDED ALSO, that the said [*mortgagor*], his heirs, executors, administrators and assigns, shall, notwithstanding the power of sale hereinbefore contained and concurrently therewith, have all the rights and remedies, by foreclosure or otherwise, of a mortgagee in ordinary cases. (112) AND the said [*mortgagor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*mortgagee*], his heirs, executors, administrators and assigns, that the said [*mortgagor*], his heirs, executors, administrators or assigns, will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators or assigns, the said sum of £——, with interest for the same after the rate aforesaid, at the time and in manner hereinbefore appointed for payment thereof. And also that the said [*mortgagor*] has in himself good right by these presents to assure the said

Proviso that mortgagee's right of foreclosure shall not be affected.

Covenants by mortgagor to pay mortgage money and interest,

—for right to convey,

" executors, administrators and assigns, shall have full discretionary power " and authority to take such measures and make such arrangements in re- " lation to the said mortgages, either by paying off the same and taking " transfers or assignments thereof, or otherwise, as shall be deemed necessary " or convenient for strengthening or improving the security hereby made, or " facilitating the execution of the said power of sale, and to pay and defray " all the costs, charges and expenses incident to such measures or arrange- " ments, out of the moneys which shall come to his or their hands by virtue " of these presents."

(112) A clause to this effect is often inserted, though it appears to be dictated by super-abundant caution.

hereditaments and premises, with their appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns in manner aforesaid. And also that the said hereditaments shall or may be peaceably and quietly held and enjoyed, and the rents, issues and profits thereof taken accordingly, without eviction, interruption or denial whatsoever, Free and clear or by the said [*mortgagor*], his heirs, executors or administrators, kept indemnified from or against all former or other estates, rights, titles, charges and incumbrances. And also that the said [*mortgagor*] and every person rightfully claiming any estate, right or interest in or to the said hereditaments and premises, or any part thereof, will or shall at any time and from time to time, (113) at the request of the said [*mortgagee*], his heirs, executors, administrators or assigns, but at the costs of the said [*mortgagor*], his heirs or assigns, until the said hereditaments and premises shall be sold and conveyed under the said power of sale, or the equity of redemption thereof be absolutely foreclosed, and afterwards, at the costs of the said [*mortgagee*], his heirs or assigns, do and execute every such act, deed, conveyance or assurance for more effectually assuring the said hereditaments and premises, with their appurtenances, unto or to the use of the said [*mortgagee*], his heirs or assigns, or as he, his heirs, executors, administrators or assigns shall direct, according to the true intent of these presents, as by the said [*mortgagee*], his heirs, executors, administrators or assigns, or his or their counsel, shall be required or advised. PROVIDED LASTLY, that until default in payment of the said sum of £——, or the interest thereof, at the time and in manner aforesaid, it shall be lawful for the said [*mortgagor*], his heirs or assigns, to hold and enjoy and take the rents and profits of the said hereditaments and premises, without interruption or denial from or by the

—for quiet enjoyment,

—for freedom from incumbrances,

and for further assurance.

Proviso that mortgagor shall enjoy till default.

(113) Not "after default," &c. as the forms often run. The mortgagee should have a right to call for the *immediate* removal of any defect. *Vide* n. 66, *suprà*.

Covenant in mortgage for further assurance.

said [*mortgagee*], his heirs or assigns, or any person or persons rightfully claiming through or under him, but no purchaser or purchasers under the power of sale hereinbefore contained shall be affected by this provision. IN WITNESS, &c.

No. 25.

MORTGAGE *in Fee, by* LEASE *and* RELEASE, *of Freeholds, and for a derivative Term, by way of* UNDERLEASE *of Leaseholds, with Power of Sale, and some Special Clauses.*

Parties.

THIS INDENTURE, made between [*mortgagors*], of, &c. of the one part, and [*mortgagees*], of, &c. of the other part.

RECITALS, —that mortgagors are seised and possessed as j. int. tenants of freeholds and of leaseholds for years,

WHEREAS the said [*mortgagors*] are now seised as joint tenants of the inheritance in fee simple in possession of the freehold hereditaments hereinafter referred to, with their appurtenances. AND WHEREAS the said [*mortgagors*] are now possessed, as joint tenants, of the leasehold tenements hereinafter referred to, with their appurtenances, for the unexpired residue of a term of —— years, commencing from the —— day of ——, in the year ——, granted by an indenture bearing date, &c., and made between, &c., subject to the rent reserved, and covenants and conditions contained, in the said indenture of lease, on the part of the lessees, their executors, administrators and assigns, to be respectively paid and observed.

—of agreement for loan.

AND WHEREAS the said [*mortgagees*] have, at the request of the said [*mortgagors*], agreed to lend to them the sum of £——, on having such security for the re-payment thereof, with interest, as hereinafter is contained.

TESTATUM.

NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £——, paid by the said [*mortgagees*] on the execution of these presents to the said [*mortgagors*], who hereby respectively acknowledge the receipt thereof, and therefrom release and discharge the said [*mortgagees*], their executors, administrators and assigns,

Release of freeholds.

Consideration.

Operative words.

The said [*mortgagors*] Do, and every of them Doth grant,

bargain, sell and release unto the said [*mortgagees*], (in their actual possession now being by virtue of a Bargain and Sale for a year, made to them by the said [*mortgagors*] on consideration of *5s.* a piece, by Indenture dated the day next before the day of the date hereof,) All the freehold parcels of ground, messuages, buildings and hereditaments comprised and particularised in the first part of the schedule hereunder written, and also delineated in the plan indorsed on the first skin of these presents, and therein distinguished by being coloured red, Together with the rights, members and appurtenances to the same premises belonging. And all the right, title and interest, legal and equitable, of the said [*mortgagors*], and every of them, in or to the same premises. And all deeds, papers, writings and muniments in their or any of their custody or power, relating to the title to the same premises, or any part thereof, with authority (114) to sue in the names or name of them, or any of them, their or any of their heirs, executors or administrators, upon any covenants for the production of deeds, writings or muniments relating to such title, or any other covenants made or entered into concerning the same premises, or any part thereof. To HOLD the said freehold hereditaments and premises hereby released, or intended so to be, unto and to the use of the said [*mortgagees*], their heirs and assigns, Nevertheless redeemable upon the terms hereinafter expressed. AND THIS INDENTURE FURTHER WITNESSETH, that for the consideration aforesaid, The said [*mortgagors*] Do, and every of them Doth, by way of underlease, demise (115) unto the said [*mortgagees*], their executors, administrators and assigns, All the leasehold parcels of grounds,

Parcels by reference to a schedule and plan.

All estate, &c.

All deeds, &c., with power to sue on covenants for production, &c.

HABENDUM.

FURTHER TESTATUM.

Underlease of leaseholds.

Parcels by reference to a schedule and plan.

(114) This authority is introduced to meet the case of a covenant to produce, &c. entered into with the mortgagors, and not running with the land.

Power to sue on personal covenant to produce.

(115) A legal term may be derived out of the freehold by way of bargain and sale under the Statute of Uses, without entry, but it cannot be derived out of a chattel interest otherwise than by a demise at the common law perfected by entry, (*suprà*, 80.)

Derivation of term out of a chattel interest.

messuages, buildings and tenements, comprised and particularised in the second part of the schedule hereunder written, and also delineated in the said plan heretofore referred to and therein distinguised by being coloured green and yellow; Together with the rights, members and appurtenances to the same premises belonging, To HOLD the said leasehold tenements and premises hereby bargained and sold, or intended so to be, with their appurtenances, unto the said [*mortgagees*], their executors, administrators and assigns, for a term of years commensurate with the residue now unexpired of the said term of —— years granted by the said indenture of lease of, &c. wanting one day (116) of such residue, Nevertheless redeemable upon the terms hereinafter expressed. PROVIDED ALWAYS, that as well the conveyance hereinbefore made of the said freehold hereditaments and premises, as the demise hereinbefore made of the said leasehold tenements and premises, are so made by way of mortgage (117) for securing to the said [*mortgagees*], their executors, administrators and assigns the payment of the sum of £——, with interest for the same after the rate of £5 per cent. per annum, and that the said [*mortgagors*], their heirs, executors, administrators and assigns, shall be entitled to redeem the same freehold and leasehold premises respectively, on payment to the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, of the said sum of £——, on the —— day of ——, which will be in the year ——, with interest for the same after the rate aforesaid, by equal half-yearly payments, on the —— day of ——, and the —— day of ——,

HABENDUM, —for a derivative term.

Provision declaratory of the object of the deed and the rights of the parties.

Mortgage of leaseholds by sub-demise.

(116) The *legal* mortgage of the leaseholds is made by way of underlease, and not of assignment, in order to avoid exposing the mortgagee to liability in respect of the rent and covenants of the lease, which as assignee he would be bound to pay and perform from the execution of the assignment, whether he should enter into possession or not. (But see 5 Jarm. Conv. 233.) By a subsequent covenant, the *equitable* security is extended to the remaining interest, (*infrà*, 338.)

(117) See n. (125), *infrà*.

in every year, without deduction for taxes or otherwise, [and in the mean time(118) to hold and enjoy the same premises respectively, and receive the rents and profits thereof,] but that if default shall be made in payment of the same sum or interest accordingly, it shall be lawful for the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, (subject nevertheless to the provision next hereinafter contained,) to [enter into the possession and the receipt of the rents and profits of the said freehold and leasehold premises, and also to] foreclose the equity of redemption of the same premises. PROVIDED FURTHER, that notwithstanding such default as aforesaid, the said [*mortgagors*], their heirs, executors, administrators and assigns, shall be entitled at any time after the said —— day of ——, and before the absolute foreclosure of the said equity of redemption, to redeem each or any of the parts into which the said freehold and leasehold premises are divided, and to which numbers are affixed in the schedule hereunder written, by giving six calendar months' previous notice in writing of their or his intention to the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, and, on the expiration of such notice, if the same shall expire on either of the said half-yearly days appointed for the payment of interest, or if not, then on such of the same days as shall happen next after the expiration of such notice, paying to the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, for the redemption of the part or parts intended to be redeemed, such portion or portions of the said sum of £—— as is or are set opposite to such part or parts in the said schedule, together with the interest for the said sum of £——, or for so much thereof as shall remain due upon this security up to the time of making such payment. PROVIDED FURTHER, that on redemption of the said

Proviso enabling the mortgagor to redeem the property in parcels.

Provision for reconveyance on redemption.

(118) See n. (122), *infrà*.

freehold and leasehold premises, or any part or parts thereof, under either of the provisions hereinbefore contained, the premises so redeemed shall, at the request and costs of the person or persons redeeming the same, be conveyed, assigned or surrendered by the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, for all their or his estate and interest therein by virtue of these presents, unto or according to the direction of the same person or persons, free from all incumbrances to be created or occasioned by the said [*mortgagees*], or any of them, their or any of their heirs, executors, administrators or assigns. PROVIDED FURTHER, that notwithstanding the provisions hereinbefore contained, it shall be lawful for the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, at any time after(119) the said —— day of ——, of their or his own absolute authority, and without the necessity of any consent or concurrence on the part of the said [*mortgagors*], or any of them, their or any of their heirs, executors, administrators or assigns, to sell the said freehold and leasehold premises, together or in parcels, by public auction or private contract, and subject to such conditions or stipulations relating to the title or evidence of title or otherwise as shall appear expedient, and to receive the moneys to arise from the sale or sales thereof, and out of the same moneys to pay or retain and satisfy the said principal sum of £——, with interest for the same after the rate aforesaid, and all costs and expenses occasioned by the non-payment thereof, or incidental to the execution of this power, and the residue or surplus (if any) of the moneys so to arise as aforesaid, shall be paid to the said [*mortgagors*], their heirs, executors, administrators or assigns, according to their respective beneficial interests.(120) PROVIDED FURTHER, that every receipt which shall be given by the said [*mortgagees*], or the survivors or survivor of them,

Power of sale.

Power to give discharges to purchasers.

(119) See n. (126), *infrà*. (120) See n. (126), *infrà*.

their or his heirs, executors, administrators or assigns, or their or his agent or agents, to the purchaser or purchasers of the said freehold and leasehold premises, for his, her or their purchase-money, shall exonerate the purchaser or purchasers from all liability in respect of the application thereof. AND the said [*mortgagors*], for themselves, their heirs, executors and administrators, hereby covenant, and each of them for himself, his heirs, executors and administrators, hereby covenants with the said [*mortgagees*], their heirs, executors, administrators and assigns, that the said [*mortgagors*], or some or one of them, their or some or one of their heirs, executors, administrators or assigns, will pay to the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, the said sum of £——, with interest for the same after the rate aforesaid, at the respective times and in manner hereinbefore appointed for payment thereof. And also that the said freehold and leasehold premises respectively shall or may be peaceably enjoyed, and the rents and profits thereof taken by the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns respectively, for all the estate, term and interest for which the same premises respectively are hereinbefore respectively released and demised, or intended so to be, according to the true intent of these presents, without any interruption or denial whatsoever; Free from all former and other estates, rights, titles and incumbrances whatsover. And also that the said [*mortgagors*] respectively, and every person having or rightfully claiming any estate, right, title or interest in or to the said freehold and leasehold premises, or any part thereof, (except the persons for the time being entitled to the benefit of the rent, covenants and conditions reserved and contained in the said indenture of lease, in respect only of such rent, covenants and conditions,) will or shall at any time or times, at the request of the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns respectively,

Joint and several covenants by mortgagors,

—for payment of the money and interest,

—for quiet enjoyment,

—for further assurance,

but at the costs of the said [*mortgagors*], or some or one of them, their or some or one of their heirs, executors, administrators or assigns, until the said freehold and leasehold premises shall be sold and conveyed or assigned, under the power of sale hereinbefore contained, or the equity of redemption thereof be absolutely foreclosed, and afterwards, at the costs of the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, make, do and execute every such act, deed and assurance for more effectually assuring the said freehold and leasehold premises respectively unto or to the use of the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns respectively, or as they or he shall respectively direct, according to the true intent of these presents, as by the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, adminstrators or assigns, or their or his counsel in the law shall be reasonably advised and required. And also that the said [*mortgagors*], or some or one of them, their or some or one of their heirs, executors or administrators, will or shall, at their or his own costs, so long as any principal money or interest shall remain due on this security, keep insured from fire in the names or name of the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, in the —— insurance office, or such other office of insurance as they or he shall from time to time direct, the several buildings comprised in the said schedule, in the several sums set opposite thereto respectively in the said schedule, and will or shall, immediately after payment of the premiums and duty in respect of such insurance, deliver to the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, the receipts for such premiums and duty; And that if any default shall be made in performance of the covenant lastly hereinbefore contained, it shall be lawful for, but not obligatory on, the said [*mortgagees*], or the survivors or survivor of them, their or his

to insure against fire,

executors, administrators or assigns, to effect and keep on foot such insurance as aforesaid, and the said [*mortgagors*], or some or one of them, their or some or one of their heirs, executors, administrators or assigns, will or shall, on demand thereof, pay or cause to be paid unto the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, such sum or sums of money as they or he shall pay or expend in or about such insurance, with interest for the same after the rate of £5 per cent. per annum from the time or respective times of paying or expending the same, (such sum and sums and interest to be a charge upon the said freehold and leasehold premises, and to be recoverable in like manner with the said sum of £—— and interest; and such policy or policies of insurance as aforesaid to be held subject to, with, and under the powers and provisions hereinbefore contained, so far as the same are applicable). And also that the said [*mortgagors*], their executors, administrators or assigns, will, at the request in writing of the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, but at the costs of the said [*mortgagors*], or the survivors or survivor of them, their or his executors, administrators or assigns, make and execute such acts and deeds as the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns shall require, or as their or his counsel shall advise for effectually assigning or assuring the said leasehold tenements and premises for the residue of the said term of years for which the said [*mortgagors*] are so possessed thereof as aforesaid, in reversion expectant on the derivative term hereinbefore created therein, either unto the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, or, at their or his option, unto such person or persons as they or he shall appoint, subject to such equities and with such powers as shall be subsisting by virtue of these presents concerning the said freehold and leasehold premises respectively, and in aid of the security

—to assign reversion of the leaseholds.

and in the meantime to hold such reversion in trust for mortgagees.

hereby made; but this covenant shall not impose upon the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, any obligation to become assignees or assignee of the last-mentioned term, nor subject them or him to any of the liabilities of an assignee thereof. (121)

Provision for reducing the rate of interest on punctual payment half-yearly.

PROVIDED NEVERTHELESS, that if the said [*mortgagors*], or any of them, their or any of their heirs, executors, administrators or assigns, shall upon or within —— days next after every or any —— day of —— and —— day of ——, so long as the said sum of £——, or any part thereof, shall remain unpaid, tender unto the said [*mortgagees*], or the survivors or survivor of them, their or his executors, administrators or assigns, such sum as shall be equal to interest after the rate of £4. 10*s.* per cent. per annum on the said sum of £——, or on so much thereof as shall remain unpaid, for the preceding half-year ending on the said —— day of —— or —— day of ——, upon or within —— days after which such tender shall be made, then the sum so tendered shall be accepted in satisfaction of the interest after the rate of £5 per cent. per annum, which shall have accrued due by virtue of these presents for such half-year.

Provision for quiet enjoyment till default.

PROVIDED FURTHER, (122) that in the meantime until default in payment of the said sum of £——, or the interest thereof, or any part of the same respectively, contrary to the true intent of these presents, it shall be lawful for the said [*mortgagors*], their heirs, executors, administrators or assigns, to hold and enjoy and to take the rents and profits of the said freehold and leasehold premises, without interruption or denial of or by the said [*mortgagees*], or any of them, their or any of their heirs, executors, administrators or assigns, but no purchaser or purchasers under the power of sale hereinbefore contained shall be in any wise affected by this proviso. PROVIDED FURTHER, that if the

(121) See *Lucas* v. *Comerford*, 8 Bro. C. C. 166.

(122) If the words with hyphens, *suprà*, 333, be inserted, this proviso may be omitted.

said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, shall sell or contract to sell, under the power of sale hereinbefore contained, otherwise than after notice in writing of their or his intention to execute such power given to the person or some or one of the persons for the time being liable to pay the principal money and interest hereby secured, or entitled to redeem the said premises, or left at his, her, or their usual or last known place or places of abode in England, and after default made in payment of all principal money, interest and costs due upon this security at the end of six calendar months from the giving or leaving such notice, then the said [*mortgagees*], or the survivors or survivor of them, their or his heirs, executors, administrators or assigns, so selling or contracting to sell, shall be deemed to have thereby committed a breach of trust, and shall be liable in equity to make compensation to the said [*mortgagors*], their heirs, executors, administrators or assigns in respect thereof, but no purchaser or purchasers under the power of sale hereinbefore contained shall be in any wise affected by this proviso. IN WITNESS, &c.

Provision restricting the exercise of the power of sale.

No. 26.

MORTGAGE, *by* APPOINTMENT, [or, *by* LEASE *and* RELEASE,] *for a Term of Years, and also in Fee, with Power of Sale and other Powers.* [A new Form.] (123)

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*mortgagor*], of, &c. of the first

Parties.

(123) The form of a mortgage security, here submitted to the profession, seeks to embrace the following objects:—1. To arm the lender himself with a legal estate, in the shape of a term for years, transmissible, along with the debt, to his personal representatives, and, of course, carrying with it the usual legal remedies by distress and ejectment. 2. To give the lender, through the medium of trustees, the additional security of the expectant fee,

Considerations on a new form of mortgage in fee, with power of sale, detailing its supposed advantages

part; [*mortgagee*], of, &c. of the second part, &c.; and [*trustees for mortgagee*], of, &c. of the third part. WHEREAS

and, consequently, the right of foreclosing the fee-simple in possession. 3. To enable the lender to enforce a sale of the fee, and afford him the opportunity of becoming the purchaser. 4. To facilitate and simplify, by means of powers of appointment given to the lender, his executors, administrators and assigns, the transfer of the security to a new lender, the conveyance to a purchaser under the power of sale, and the restoration of the fee to the mortgagor on redemption. It is conceived that the adoption of the proposed form would obviate or lessen several disadvantages incident to the ordinary form of a mortgage in fee, inasmuch as—1. The immediate legal dominion over the pledge would always accompany the debt; whereas, under the ordinary form, the pledge devolves upon the real, and the debt upon the personal representative, except so far as the separation is prevented by the precaution of *devising* the legal fee to the executor. 2. No difficulty can possibly arise from the eventual vesting of the legal fee in an infant, feme covert, or other incapacitated person, since it may always be divested by an exercise of one or other of the powers; whereas, the present practice frequently renders it necessary to incur the expense and delay of an application to the Court of Chancery in order to obtain the legal fee. 3. By lodging the power of sale in trustees, while the lender is empowered to change the trustees at pleasure, *some* protection is afforded to the mortgagor against an abuse of the power, without throwing any impediment in the way of its fair exercise. 4. The difference in expense between a conveyance by lease and release and a conveyance by appointment, is saved on the redemption and transfer of the mortgage.—In short, an attempt is here made to combine the advantages of a mortgage for years, a mortgage in fee, and a conveyance in trust for sale, in one security, and *that* in a form more concise and convenient than the precedents in general use. It should be observed, that the limitation of the term was suggested by two considerations,—first, the expediency of investing the lender, in his own person, with the common legal remedies of a mortgagee; and, secondly, the necessity of ascertaining, by some *legal* criterion, the donee of the powers to appoint the use, which are given to the "assigns" of the lender, in respect of the *term*, assignable at law, and not in repect of the *debt*, assignable in equity only. (See *How* v. *Whitfield*, 1 Vent. 338; 2 Show. 57; 1 Freem. 476.) In order to guard against possible objections to the powers on the ground of remoteness, (but see *Biddle* v. *Perkins*, 4 Sim. 135; *Power* v. *Capron*, ib. 138, n.; *Waring* v. *Coventry*, 1 Mylne & Keene, 249; *Boyce* v. *Hanning*, 2 Cromp. & Jer. 334,) their continuance is limited to a life in being and twenty-one

by virtue of indentures of lease and release, dated respectively the —— and —— days of ——, in the year ——, the indenture of release being made between, &c. the inheritance in fee-simple in possession of the hereditaments hereinafter described stands limited, To such uses as the said [*mortgagor*] shall by deed appoint, [*or*, AND WHEREAS, the said (*mortgagor*) is seised of or entitled to the fee simple in possession of the hereditaments hereinafter described]. AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, at interest, on the security hereinafter provided. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— paid by the said [*mortgagee*] to the said [*mortgagor*] on the execution of these presents, The said [*mortgagor*], in execution of the aforesaid power given to him by the said recited indentures and of all other powers hereunto enabling him, Doth appoint that All those messuages, &c. situate, &c. now in the occupation of ——, as tenant from year to year to the said [*mortgagor*], at the yearly rent of £——, payable half-yearly, at Lady-day and Michaelmas; Also all that other messuage, &c. Also all those closes, &c. Which messuage last-mentioned and closes are now in the personal occupation of the said [*mortgagor*], Together with the appurtenances to the said premises respectively belonging, shall henceforth be subject to the powers hereinafter contained, and, subject thereto shall remain to the uses following, (namely), [*or*, The said (*mortgagor*) Doth grant, bargain, sell and release unto the said (*mortgagee*), his heirs and assigns, (in his actual possession now being by virtue of a bargain and sale for a year of even date herewith, and of the statute for transferring

RECITALS,

—that the fee stands limited to such uses as the mortgagor shall by deed appoint,

(*or*—that the mortgagor is seised in fee,)

—of agreement for the loan.

TESTATUM.

Appointment by mortgagor.

Parcels.

(Or—release by mortgagor to mortgagee.)

years, which period it is at length settled may be taken as an *absolute* period, (*Bengough* v. *Edridge*, 1 Sim. 172; *Cadell* v. *Palmer*, 10 Bing. 140, affirmed in Dom. Proc. 25 June, 1833); and which period exceeds the probable duration of the loan. The subsequent forms of transfer, &c. are added in order to show the the practical application of the powers contained in the principal precedent.

uses into possession), All, &c. Together with the appurtenances to the said premises respectively belonging, And also all the estate, right, title and interest of the said (*mortgagor*), therein and thereto, To Hold the said hereditaments and premises hereby released or intended so to be, with their appurtenances, unto the said (*mortgagee*) and his heirs.] To the use of the said [*mortgagee*], his executors, administrators and assigns, for the term of 500 years, to be computed from the date of these presents, without impeachment of waste; And, subject to the said term, To the use of the said [*trustees*], their heirs and assigns, In trust for the said [*mortgagee*], his heirs (124) and assigns. Nevertheless it is hereby declared that the use hereinbefore limited to the said [*mortgagee*], his executors, administrators and assigns, and the use hereinbefore limited to the said [*trustees*], their heirs and assigns shall be deemed in equity to be so limited by way of mortgage only (125) for securing to the said [*mort-*

To the use of mortgagee for a long term of years.

To the use of trustees in fee, in trust for the mortgagee.

Declaration that the preceding uses are limited by way of mortgage for securing the principal sum with interest half-yearly.

Trust limitation of the fee to the mortgagee, his *executors*, &c.

(124) Where the fee is vested in a trustee for the lender, the trust is sometimes declared in favour of the lender, his *executors*, *administrators* and assigns, on the ground, it is presumed, that a mortgage in fee is in equity a mere pledge, and that the benefit of a foreclosure of the equity of redemption, after the death of the mortgagee, accrues to his personal estate; but it should be observed, that the office of the declaration is to ascertain the quantity of interest to be taken by the mortgagee, or, in other words, to limit the equitable fee, the limitation of which should pursue the legal form, and not to determine the character of the transaction as between the real and the personal representatives of the mortgagee, which should be left to the doctrines of equity;—besides, the mortgagee may himself foreclose, and become owner of the fee.

Modes of framing the proviso for redemption.

(125) It seems better to declare in terms the object and effect of the conveyance. Originally a mortgage was a legal alienation, (commonly for a long term of years,) conditioned to be void on payment of the principal and interest on a given day. On non-payment at the appointed time, the alienation became absolute at law, though the pledge was still redeemable in equity. Now, however, a mortgage is usually a conveyance of the fee, with a proviso for redemption and *re-conveyance* on payment of the principal money and interest. The conveyance is, therefore, absolute at law from the beginning;—not that a conveyance of the fee cannot be conditioned to be

gagee], his executors, administrators and assigns, the payment of the sum of £——, on the —— day of ——, in the year

void, but, as a power of sale is generally given after default in payment of the money, such a condition would be objectionable, as rendering the *legal* title of the purchaser dependent on the fact of default in payment, which *may* have been paid or tendered on the day. Besides, in point of fact, payment *on* the day is extremely rare, and even when it does occur, the evidence of such payment is not always satisfactory, so that it is seldom prudent to dispense with a reconveyance or surrender. (See *Doe* v. *Maisey*, 3 Mann. & Ryl. 108, n.)

New form proposed, its supposed advantages.

The form given in the text appears to possess these advantages:—1. It distinctly ascertains the character of the transaction. 2. Where the mortgage is effected by the concurrence of several parties in respect of distinct interests, it affords an escape from the often difficult, and sometimes impracticable task of adapting the clause to the circumstances of the title—of expressing by whom the payment may be made, and to whom or in what manner the estate shall be reconveyed. 3. While it excuses the draughtsman from attempting to indicate the equitable rights of the mortgagors, it relieves the title from the danger of his miscarriage;—a danger of which the reports afford abundant testimony, particularly the cases which have arisen upon mortgages by the husband and wife of her inheritance. (See *Jackson* v. *Innes*, 1 Bligh's Parl. R. 123, O. S.) That form of proviso which avoids the deed on payment, is also attended, to a certain extent, with the same advantages, and is so far an eligible form.

Constructive revocation of mortgagor's will by a direction to reconvey to new uses.

In connection with the subject of this note, a point of considerable interest to the conveyancer presents itself—the effect of a direction to reconvey in operating a constructive revocation of a prior devise by the mortgagor. It has long been settled that if A. contracts to purchase the fee—then devises his equitable fee under the contract—and afterwards takes a conveyance to the common uses to prevent dower, or to himself and a trustee jointly, the devise is constructively revoked. (*Rawlins* v. *Burgis*, 2 Ves. & B. 382; and see 1 Sugd. Vend. 9th ed. 179; *Ward* v. *Moore*, 4 Madd. 368.) In the case of *Brain* v. *Brain*, 6 Madd. 221, land was conveyed to A. *in fee*, who mortgaged in fee, with a direction to reconvey to him in fee, *or to such uses*, &c. as he should by deed, &c. direct. The question was, whether a devise made by A., in the interval between the conveyance and the mortgage, was constructively revoked. Of course, the mortgage in fee was a total revocation *at law*; the doubt was, whether the mode of reconveyance prescribed amounted to a total revocation in equity. There were two grounds on which the non-revocation might

——, and of interest for the same after the rate of 5*l.* per cent. per annum half-yearly, on the —— day of ——, and the

have been maintained:—1. The direction to reconvey was *informally* and unadvisedly introduced, and therefore, on the principle of the cases of mortgages by husband and wife of her estate, ought not to have had any effect in changing the state of the title to the beneficial ownership. (See *Jackson* v. *Innes*, 1 Bligh's Parl. R. 123, O.S. and the cases there cited.) 2. In equity the result is the same, both in point of dominion, and in regard to the mode of exercising the dominion, whether the fee be limited to A. simply, or to such uses as A. shall appoint, and, in default of appointment, to A. In either case, A. may transfer the equitable fee by any form of conveyance, and even by a mere contract. Perhaps, however, it ought to be considered that the result will *not* be the same, either at law or in equity, *when the conveyance comes to be actually made*, if made according to the tenor of the direction. The Vice-Chancellor held that the devise was revoked in equity *pro tanto* only, and appears to have relied on the *second* ground; although the first ground may be thought to have afforded a more satisfactory basis of decision. What would have been the effect of a direction to reconvey to the common uses to prevent dower, or simply to such uses as the mortgagor should appoint; and in default of appointment to him in fee, expressed in formal language? The avowed principle of decision in *Brain* v. *Brain*,—namely, that in equity the fee was still to be enjoyed and disposed of in the same manner as if it had not been so modified—would seem to go the length of denying the revoking effect of even such a direction, contrary certainly to the strong tendency, if not to the positive authority, of decided cases. (*Tickner* v. *Tickner*, 1 Wils. 309, cited; *Kenyon* v. *Sutton*, 2 Ves. jun. 601, cited; *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 106.) In a case which occurred in practice of a contract to purchase, with a direction to convey to the purchaser, "or to such person or persons as he should appoint," followed by a conveyance to the common uses to prevent dower, a gentleman of great eminence considered it extremely questionable whether, notwithstanding the words "or to such person," &c. an intervening will of the purchaser was not revoked by the effect of the conveyance. The principle above stated would, it is conceived, conduct to the conclusion that the will *was* revoked, inasmuch as that principle treats a direction to convey to A. or to such uses as he shall appoint, as being, in effect, a direction to convey in fee, or rather as being a limitation of the *equitable fee*. Now, take the case of a conveyance to the uses to prevent dower, followed by a mortgage in fee, with a direction to reconvey to or in trust for the purchaser, his heirs and assigns; or, in other words, with a limitation of the equity of redemption to him in fee. If it were clear

—— day of ——, without deduction; and that if default shall be made in payment of the same sum or interest accordingly, it shall be lawful for the said [*mortgagee*], his executors, administrators or assigns, to foreclose the equity of redemption of the fee-simple in possession of the said hereditaments, but that until such default the person or persons for the time being entitled to the equity of redemption shall be permitted

—and that in default of payment mortgagee may foreclose,

—but that in the meantime the mortgagor may enjoy.

that where there is a conveyance in fee—then a devise—then a mortgage in fee, with a direction to reconvey to the uses to prevent dower, there is no revocation, it would follow that there is no revocation in the converse case, unless it can be maintained that, although, in regard to the equitable interest, uses to prevent dower amount to a limitation in fee, yet a limitation in fee is not, therefore, identical with uses to prevent dower. *Brain* v. *Brain* was a weak case for the constructive revocation doctrine; yet the point was thought worth contesting between adverse claimants. It therefore dictates caution to purchasers.

General principle of equity in regard to informal directions to reconvey.

Where a mortgage is made by husband and wife of her estate, or by the donee or joint donees of a power, a loose direction to reconvey, in the former case, to the husband, his heirs and assigns, or to the husband and wife, their heirs and assigns, or, in the latter case, to the donee or donees, his or their heirs and assigns, or to one of the donees, his heirs and assigns, does not prevent the ownership of the equity of redemption from resulting according to the anterior title; or, in other words, the effect of the transaction is merely an alienation or appointment to the extent of letting in the incumbrance. The direction is rejected on the equitable principle, that a mortgage, or other alienation of that nature, shall not be extended beyond its legitimate purpose, without a clear indication of intention to produce an effect *ultra* that purpose,—a broad and intelligible principle, to which the solution of the questions above propounded may be deemed properly referable, but to which they cannot with safety be referred, having regard to the peculiar nature of the doctrine of constructive revocation in equity, and considering, as Lord Eldon remarks, (8 Ves. 128,) "how very little in addition to that mere purpose will revoke." It is impossible not to perceive that this doctrine has proceeded upon distinctions which have no vitality or substance in them—upon airy nothings which elude the grasp. The mischief of a doctrine not based on principle is, that the practitioner is never sure unless he can produce an adjudicated case the very same *in specie et terminis*. (See further on this subject, 1 Jarman's Pow. Dev. 559, n.)

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to enjoy the said hereditaments, and retain the rents thereof, without interruption from the said [*mortgagee*] or the said [*trustees*], or any of them, or any person or persons claiming under them or any of them. And, in order to facilitate the reconveyance of the said hereditaments on or after the redemption thereof, the said [*mortgagor*] hereby empowers the said [*mortgagee*], his executors, administrators and assigns, on or after such redemption, (whether the debt and interest shall be paid at the time hereinbefore appointed or not,) by deed attested by one or more than one witness, to appoint the use of the said hereditaments in such manner as shall be requisite for effecting the purposes of such reconveyance.

Power enabling the mortgagee to appoint on redemption.

And, as a further and concurrent security for the payment of the said sum of £—— and interest, the said [*mortgagor*] hereby empowers the said [*trustees*], and the survivor of them, his executors and administrators, at any time after the expiration of six calendar months from the said —— day of ——, in the year ——, (126) at the request in writing of the said [*mortgagee*], his executors, administrators or assigns, and notwithstanding the dissent of the said [*mortgagor*], his heirs or assigns, to sell the said hereditaments, together or in parcels, by public auction or private contract, subject to such conditions as to the title, and the evidence of title, and the mode and time of payment of the purchase-money, and other matters relating to the sale, as the said [*trustees*], or the survivor of them, his executors or administrators, shall in their or his discretion think expedient; and the said

Power enabling the trustees, at the request of the mortgagee, to sell.

Mode of restricting the exercise of the power of sale.

(126) The power of sale is, in point of *expression*, commonly limited not to arise till default has been made, and notice given, but as purchasers are absolved by a subsequent clause from all liability in regard to default and notice, the power is in point of effect uncontrolled. It seems better to avoid the repugnancy occasioned by this mode of framing the clauses, and to give in the first instance an unrestricted power, correcting it in the sequel by a provision operating only as matter of contract and confidence between the mortgagor and mortgagee.

[*mortgagor*] also empowers the said [*mortgagee*], his executors, administrators and assigns (127) thereupon, by deed

Power enabling the mortgagee to appoint to purchasers.

(127) When the legal fee is vested in the mortgagee, a *power* of sale given to him operates only in equity, and is in effect a *trust*. The power is commonly given to the mortgagee, his *heirs* and *assigns*, in respect of his estate in the *land*. The consequence is, that not only the legal estate, but the equitable authority and discretion, may be disjoined from the beneficial interest in the security, and become vested in an infant heir or devisee, or other incapacitated person. It may, therefore, be thought that such powers ought to be given to the mortgagee, his *executors, administrators and assigns*, in respect of his right to the *money*, in order that the personal representatives may, notwithstanding the infancy of an heir, &c. be enabled to confer a good equitable title upon a purchaser, thus reducing the inconvenience to the necessity of applying to the Court of Chancery under the Act of 1 Wm. 4, c. 60, s. 6, for a conveyance to the legal estate. This is sometimes attempted, but it is attended with more difficulty than at first presents itself; and on consideration it would seem impracticable to annex the power to the beneficial interest in the debt, which is susceptible of such various modifications and destinations in equity, while no advantage would result from annexing it to the legal interest in the debt, which is not assignable. The power in the text is given to the mortgagee, his *executors, administrators and assigns*, in respect of the legal *term* of years vested in him. (*Suprà*, n. (122).) The laudable desire of preventing generally the necessity of resorting to the Court of Chancery in consequence of the devolution of the legal estate upon an infant, &c. without departing from the received form of a mortgage, recently produced the following case, which was submitted to two conveyancers of the first eminence.

Plan proposed to prevent the fee from vesting indefeasibly in the infant heir, &c. of mortgagee in fee.

"It appears that the necessity of a conveyance from the incapacitated "heir of a mortgagee may be obviated by a slight alteration in the form of "a mortgage deed. It is proposed that the estate should be limited to such "uses and upon and for such trusts, intents and purposes as the said [*mort-"gagee*], his executors or administrators, shall by any deed or deeds ap-"point, and in default of appointment, to the use of the said [*mortgagee*], "his heirs and assigns, subject to the proviso for redemption, as usual. "The power of sale might be given to the mortgagee, his executors or ad-"ministrators, or his or their appointees or assigns. The joint opinion of "Mr. —— and Mr. —— is requested whether the proposed alteration in "the form of a mortgage deed will be effectual for the purpose intended? "And whether, viewing the question in all its bearings, it is probable that

Opinion of counsel, and remarks upon the plan.

attested by one or more than one witness, to appoint the

" such alteration would give rise to any difficulty or inconvenience what-
" soever?" The following opinion was given:— " We are of opinion that
" the clause proposed is objectionable, as tending to a perpetuity. But we
" think the object may be accomplished by a power for the executors or
" administrators of the mortgagee to appoint the estate, at any time during
" the infancy of his heir, to any person or persons in fee, subject to the
" equity of redemption; and as this power will, as to the time of exercising
" it, be confined to the infancy of the heir of the original mortgagee, a
" similar power may be given to the executors or administrators of any
" person in whom the fee-simple may become vested by conveyance, devise
" or descent, to be exercised during the infancy of the heir of such person
" at any time within twenty-one years from the date of the mortgage."

This opinion, so far as it relates to the question of perpetuity, will appear to be well founded when the real nature of the power is considered. A power raised by a conveyance to uses is an executory use disguised under a different name. (*Suprà*, n. 57.) If the power in question were to assume its true form of an executory limitation, its invalidity would probably be at once conceded; for it will hardly be contended that a limitation of the use to A. in fee, and if A. or his executors or administrators shall at any distance of time do a given act, then to B. in fee, is valid as to B.; yet that indefinite limitation differs not in substance from the uncircumscribed power of appointment. As the power is a constituent part of the mortgage security, and as a mortgage is in contemplation of equity an alienation for a limited purpose only, it may be contended that the power is in effect restrained by the nature of the transaction. But arguments drawn from the *equitable* character of the assurance cannot obviate the *legal* objection to the power. The same reasoning which went to prove the validity of the power would equally prove that a limitation to A. in fee, may be defeasible by an executory limitation to B., to take effect on the indefinite failure of the issue of C., or on the happening of any other event, how remote soever—a position contradicted by all the authorities. It is true that A. and B. concurring may alien the absolute fee, or that B., by releasing his executory interest to A., may render the fee absolute in A., so that the land is not necessarily withdrawn from commerce; but, as no disposition to be made by A., or by those claiming under him, will confer an indefeasible title, even for a day, during the suspense of the executory limitation (which limitation renders the fee, and every derivative interest, precarious), and as this state of things may continue for centuries, it is ob-

Principle of the rule against perpetuities.

use (128) of the hereditaments so sold (discharged from the limitations hereinbefore contained, and from all right and equity of redemption under these presents), in such manner as shall be requisite or expedient for completing the sale. And the said [*mortgagor*] hereby declares that the said [*mortgagee*], his executors, administrators or assigns, making such request as aforesaid, shall be at liberty to purchase the said hereditaments, or any part thereof, at any sale by public auction under the preceding power. And the said [*mortgagor*] hereby directs that the said [*trustees*], or the survivor of them, his executors or administrators, shall receive the money to arise from the sale of the said hereditaments, and in the first place defray thereout the expenses incident to the sale (including the expenses of making out and perfecting the title), and in the next place satisfy the principal money, interest and costs which shall be then due upon this security, and shall dispose of the surplus according to the ownership

Liberty to the mortgagee to purchase by auction.

Direction respecting the application of the produce of the sale.

vious that if such limitations were allowed, they would induce the worst species of perpetuity—a possession in jeopardy every moment for an indefinite period of time. The books are silent as to the reason for refusing effect to limitations of this description; but the decisions establishing their invalidity appear to rest on solid grounds. The power in question is apparently obnoxious to the same objection. If, however, remoteness presented the only difficulty, it might be overcome by confining the power to a life or lives in being, and twenty-one years. But while in one point of view the power is too extensive, it is in another point of view too narrow, since it does not reach beyond the executors and administrators of the original mortgagee. The form given in the text endeavours to secure the transmission of the power to every future holder of the mortgage by attaching the power to a legal chattel interest in the land. (After this note was written, the writer was favoured with the observations contained in note (134), *infrà*, to which the reader is referred.)

(128) It is more correct to speak of "appointing the use of the land to A.," than of "appointing the land to the use of A.," for the subject of the power is not the land, but the use; on which principle it is that when the donee of a legal power raised by a conveyance to uses, appoints to A. to the use of B., the legal estate is executed in A., and a mere equitable interest is taken by B.

Appointment operates upon the use.

Declaration that the receipts of the trustees shall be discharges to pur hase s.

of the equity of redemption (129). And the said [*mortgagor*] hereby declares that the receipt of the said [*trustees*], or the survivor of them, his executors or administrators, for the money to arise as aforesaid, shall exempt the person or persons paying the same from all liability in respect of the application thereof. And the said [*mortgagor*] hereby empowers the said [*mortgagee*], his executors, administrators and assigns, when and so often as he or they shall think fit, by deed attested by one or more than one witness, to appoint any person or persons to be a trustee or trustees for the purposes of the trusts and powers hereinbefore vested in the said [*trustees*], in the place of the trustee or trustees or of any trustee for the time being (which trustees or trustee shall, by the effect of such appointment, be discharged), or of any deceased trustees or trustee; and hereby declares that on

Power enabling the mortgagee to appoint new trustees.

Declaration vesting the fee in the appointed trustees.

Distination of the surplus produce of the sale.

(129) The surplus is directed to be paid, sometimes, to the mortgagor, his heirs or assigns; sometimes, to him, his executors, administrators or assigns, as personal estate; and sometimes a learned and elaborate distinction is taken between the effect of a sale in his lifetime, and a sale after his death, the surplus being given in the former case to him, his executors, administrators and assigns, as personal estate, and in the latter case to his heirs or assigns, as real estate. But it is conceived, that nothing short of the concurrence of the mortgagor in a sale, or of a very explicit declaration of his intention, would operate a *conversion* in equity as between his real and personal representatives; otherwise, the destination of the surplus would rest with the mortgagee, and be exposed to accident, caprice, and even collusion, contrary to every principle of equity. The power of sale is merely auxiliary to the mortgage, which in equity amounts only to a charge, leaving the surplus produce of the sale, no less than the unexhausted interest in the land, essentially real estate.—Occasionally, too, where the ownership is divided, attempts are made to relieve the mortgagee from the trouble and responsibility of distributing the surplus, by authorising payment of the whole to one of the parties, his executors, administrators or assigns, without prejudice to the equities of the other claimants; but it should be recollected that in the simple case of a mortgage by a sole owner in fee, the equity of redemption *may* be put in settlement the next day, and that the mortgagee, with notice, will be bound to regard the equities created by such settlement; and the efficacy, under all future circumstances, of any prospective provisions of this nature may well be questioned.

every such appointment, and as a legal consequence thereof, the use of the fee-simple hereinbefore limited to the said [*trustees*], their heirs and assigns, shall shift to and be executed in the trustees so appointed jointly, or (as the case may be) the trustees so appointed conjointly with the surviving or continuing trustee. And it is hereby declared, that the powers hereinbefore given to the said [*mortgagee*], his executors, administrators and assigns, are so given in respect of and as annexed to the said term of 500 years (130), and that the continuance of such powers shall, so far as the same are capable of effect at law, be confined (131) to the life of the said [*mortgagee*], and twenty-one years to be computed from his death. And the said [*mortgagor*], for himself, his heirs, executors and administrators, hereby covenants with the said [*mortgagee*], his executors, administrators and assigns, that the said [*mortgagor*], his heirs, executors, administrators or assigns, will pay unto the said [*mortgagee*], his executors, administrators or assigns, the said sum of £——, and the interest thereof, after the rate aforesaid, at the respective times and in manner aforesaid. And also that the said [*mortgagor*], his heirs, executors, administrators or assigns, will not, during the continuance of the mortgage hereby made, cut any of the timber or other trees which shall be growing upon any part of the said hereditaments, without the previous consent in writing of the said [*mortgagor*], his executors, administrators or assigns. And also that the said [*mortgagor*], his heirs, executors, administrators or assigns, will, at his or their own costs, during the continuance of the mortgage hereby made, keep the buildings erected and to be erected on the said hereditaments, or any part or parts thereof, insured against loss by fire, in the sum of £——, in the name or names of the said [*mortgagee*], his executors, administrators or assigns, in the —— insurance office, or such other insurance office as he or they shall from time to time appoint, and deliver to him or them proper receipts for the premiums and duty in respect

Declaration ascertaining the donee or donees, and limiting the legal continuance of the powers.

Covenants by mortgagors with mortgagee, for payment of the debt and interest,

—not to cut timber without consent,

—for insurance against fire.

(130) *Suprà*, n. (123). (131) *Ib.*

of such insurance within six days after the same shall become due; and that if the said [*mortgagor*], his heirs, executors, administrators or assigns, shall fail so to do, and the said [*mortgagee*], his executors, administrators or assigns, shall, with his or their own money, insure or keep insured the said buildings in the sum aforesaid, or any less sum, then the said [*mortgagor*], his heirs, executors, administrators or assigns, will, on demand, repay to the said [*mortgagee*], his executors, administrators or assigns, the money expended by him or them on such insurance, with interest after the rate of £5 per cent. per annum, which money and interest shall be covered by this security. And the said [*mortgagor*] hereby declares that such insurance as aforesaid shall be considered as auxiliary to the security hereinbefore made, and be disposed of accordingly. And the said [*mortgagor*] for himself, his heirs, executors and administrators, hereby further covenants with the said [*mortgagee*], his executors, administrators and assigns, and also hereby covenants (as a separate covenant) with the said [*trustees*], their heirs and assigns, that the said hereditaments shall or may be enjoyed and disposed of according to the limitations and provisions hereinbefore contained, without any interruption or denial, and free from all charges and incumbrances whatsoever. And also that the said [*mortgagor*] and every person rightfully claiming any estate or interest in the said hereditaments, will at the request of the said [*mortgagee*], his executors, administrators or assigns, or of the said [*trustees*], their heirs or assigns, but at the costs of the said [*mortgagor*], his heirs, executors, administrators or assigns, until the absolute foreclosure of the equity of redemption or the sale of the said hereditaments, execute such further assurances of the said hereditaments, or any part thereof, as the said [*mortgagee*], his executors, administrators or assigns, or the said [*trustees*], their heirs or assigns, shall reasonably require. Provided nevertheless, that if the said hereditaments, or any part thereof, shall be sold under the power of sale hereinbefore contained, and the said [*mort-*

Declaration that insurance shall go in aid of the principal security.

Covenants (absolute) by mortgagor with mortgagee, and separately with trustees,

—for quiet enjoyment, free from incumbrances,

—for further assurance.

Defeasance of absolute covenants on mortgagor's entering into the usual qualified covenants with a purchaser.

gagor], his heirs or assigns, shall join in the conveyance to the purchaser, and thereby enter into such qualified covenants for title, quiet enjoyment, freedom from incumbrances, and further assurance as the purchaser shall be entitled to require, then the absolute covenants hereinbefore entered into by the said [*mortgagor*], in relation to the hereditaments so sold shall thenceforth be void, Provided nevertheless, that if upon or within twenty-one days after every or any of the days on which the half-yearly payments of interest on the said sum of £—— shall become due, tender shall be made to the said [*mortgagee*], his executors, administrators or assigns, of the sum of £——, being interest thereon at the rate of £4: 10*s.* per cent. per annum, then the sum so tendered shall be accepted in satisfaction of the interest thereon at the rate of £5 per cent. per annum, due for the half-year preceding the day upon or within twenty-one days after which such tender shall be made. Provided also, that if the said [*mortgagee*], his executors, administrators or assigns, shall cause the power of sale hereinbefore contained to be exercised, either after payment or tender of all principal money, interest and costs due on this security, or before the expiration of —— calendar months from the giving or leaving of notice in writing under his or their hand or hands, of his or their intention to cause a sale of the said hereditaments (such notice to be given to the person or persons, or some or one of the persons for the time being entitled to redeem the said hereditaments, or left at his or their usual or last known place or places of abode in England), then the said [*mortgagee*], his executors, administrators or assigns, so causing the said power to be exercised, shall be answerable as for a breach of trust in equity, and also in damages as for a breach of contract at law. (132) And lastly, for enabling the said [*mort-*

Provision for reducing the rate of interest on punctual payment half-yearly.

Provision restricting, as between mortgagor and mortgagee, the exercise of the power of sale.

Admission by mortgagor that he

(132) The mortgagee is not unfrequently made to *covenant* that the power of sale shall not be exercised without previous notice, &c.; but a

Covenant against an undue exercise of the power of sale.

holds lands in hand as tenant to mortgagee at a fixed rent.

gagee], his executors, administrators and assigns, to pursue the remedy by distress, in regard to the said messuages and closes now in the occupation of the said [*mortgagor*], he (the said [*mortgagor*] hereby admits himself to be tenant thereof (133) from year to year to the said [*mortgagee*], his executors, administrators and assigns, at the yearly rent of £——, payable half-yearly, on the —— day of —— and the —— day of ——. (134) IN WITNESS, &c.

covenant is objectionable, inasmuch as after a transfer of the mortgage it continues to charge the mortgagee and his assets, while it does not charge the transferee and his assets.

Power to mortgagee to distrain.

(133) Where the mortgagor is himself the occupier, he should become tenant to the mortgagee at a fixed rent, otherwise the mortgagee cannot distrain. The rent should be equal to the annual value, and not merely to the interest of the debt:—Sometimes a power is given to the mortgagee to distrain, if the interest be in arrear; but to make the mortgagor, who departs with the legal estate, grant a power of distress to the mortgagee, who acquires that estate, seems to be at best a work of supererogation.

Suggestions by Mr. R. C. Walters, for an improved form of mortgage in fee, with power of sale.

(134) The writer has great pleasure in adding to his own speculations on the form of a mortgage in fee, (*suprà*, n. 123, and see n. 127,) the following remarks, with which he has been favoured by Mr. Robert Clayton Walters, who has devoted considerable attention to this important subject:—

"In considering the proper form of a mortgage deed, three points seem "important:—1. That the security should devolve, together with the debt, "to the personal representatives of the mortgagee. 2. That the security "should be easily convertible or made available in case the mortgagor "should make default in payment. 3. That the form should be as simple "and inexpensive as may be.

"To satisfy the first two requisitions, the personal representatives of the "mortgagee should have absolute power to sell the whole estate of the "mortgagor in the mortgaged premises, free from any equity of redemption. It is obvious that the present system does not accomplish this. "For instance, suppose a mortgage in fee for £250, with a power of sale "given to the mortgagee, his heirs or assigns; the mortgagee dies intestate, "or with an informal will, leaving an infant or a lunatic heir. If it be "wished to transfer the mortgaged premises, an order must be obtained "from the Court of Chancery, at an expense which can scarcely be less "than £30, and may exceed £50. This is a heavy burden upon a small "estate; and such cases occur more frequently in small transactions than

No. 27.

TRANSFER *of a* MORTGAGE IN FEE *with Power of Sale, to a new Lender, with a Further Charge.* [New Form, *founded on* No. 26.]

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*mortgagee*], of, &c. of the first part, [*mortgagor*], of, &c. of the second part, [*transferee*], of, &c. of the third part, and [*trustees for transferee*], of, &c. of Parties.

" in larger ones, where the property is probably vested in a mortgagee who " makes a sufficient will. Again, though the legal estate may be conveyed " through the medium of an order of the Court of Chancery, the power of " sale cannot be exercised, [*quære?*] and thus the estate of the mortgagee " may be greatly inconvenienced.

" To obviate the existing inconveniences I propose that the mortgaged " premises should be conveyed,—' To such uses and upon and for such " trusts, intents, and purposes as the said [*mortgagee*], or his executors or " administrators, within the space of twenty-one years next after his " decease, shall by any deed or deeds appoint; and in default of such " appointment, to the use of the said [*mortgagee*], his heirs and assigns, " subject nevertheless to the proviso for redemption hereinafter contained.'

" In case it is necessary that the security should be transferred, the " mortgagee may appoint, and if the mortgagor join, he may confirm the " premises,—' To such uses and upon and for such trusts, intents and pur- " poses as the said [*new mortgagee*], or his executors or administrators, " within the space of twenty-one years next after his decease, shall by any " deed or deeds appoint; and in default of such appointment, To the use " of the said [*new mortgagee*], his heirs and assigns, subject nevertheless to " such right and equity of redemption as the said premises are subject to.'

" The power of sale should be given to the person or persons who shall " for the time being be competent to appoint or convey the said hereby " mortgaged premises. I assume that the exercise of such a power need " not be confined to twenty-one years after the decease of the donee; for it " is not a power in the technical sense. It is not to revoke uses or to limit " uses, but merely to discharge the land from the mortgagor's equity to " redeem: and in a court of equity it tends to no perpetuity, for there it " may at any time be put an end to by the owner of the equity which it " controls."

RECITALS, —of mortgage.

the fourth part. WHEREAS, by an indenture (135) dated the —— day of ——, in the year ——, and made between the said [*mortgagor*], of the first part, the said [*mortgagee*], of the second part, and [*trustees for mortgagee*], of the third part, In consideration of the sum of £——, paid by the said [*mortgagee*] to the said [*mortgagor*], All [*parcels*], with their appurtenances, were limited by the said [*mortgagor*] To the use of the said [*mortgagee*], his executors, administrators and assigns, for the term of 500 years, to be computed from the date thereof, without impeachment of waste, And, subject to the said term, To the use of the said [*trustees for mortgagee*], their heirs and assigns, In trust for the said [*mortgagee*], his heirs and assigns; subject to a declaration that the use thereinbefore limited to the said [*mortgagee*], his executors, administrators and assigns, and the use thereinbefore limited to the said [*trustees for mortgagee*], their heirs and assigns, should be deemed in equity to be so limited by way of mortgage only for securing to the said [*mortgagee*], his executors, administrators and assigns, the payment of the sum of £——, on the —— day of ——, in the year ——, and of interest for the same, after the rate of £5 per cent. per annum, half-yearly, on the —— day of —— and the —— day of ——, without deduction. And by the said indenture, as a further and concurrent security for the payment of the said sum of £—— and interest, power was given to the said [*trustees for mortgagee*], and the survivor of them, his executors and administrators, after the expiration of six calendar months from the said —— day of ——, in the year ——, at the request in writing of the said [*mortgagee*], his executors, administrators or assigns, to sell the said hereditaments, and power was also given to the said [*mortgagee*], his executors, administrators, and assigns, to appoint the use of the hereditaments so sold in such manner as should be requisite or expedient for

(135) If the mortgage be by lease and release, (see No. 26, *suprà*,) vary the recital accordingly.

completing the sale. And by the said indenture a power was also given to the said [*mortgagee*], his executors, administrators and assigns, enabling him or them, when and so often as he or they should think fit, by deed attested by or more than one witness, to appoint any person or persons to be a trustee or trustees for the purposes of the trusts and powers thereinbefore vested in the said trustees, in the place of the trustee or trustees, or of any trustee for the time being, (which trustee or trustees should, by the effect of such appointment, be discharged,) with a declaration that on every such appointment, and a legal consequence thereof, the use of the fee-simple thereinbefore limited to the said [*trustees*], their heirs and assigns, should shift to and be executed in the trustees so appointed. AND WHEREAS the said sum of £—— remains secured to the said [*mortgagee*], by the said recited indenture, but the interest thereof has been paid up to the day of the date of these presents. AND WHEREAS the said [*transferee*] has agreed to pay the said sum of £—— to the said [*mortgagee*], on having the mortgage security made by the said recited indenture transferred in manner hereinafter expressed. NOW THEREFORE THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— paid by the said [*transferee*] to the said [*mortgagee*], on the execution of these presents, The said [*mortgagee*] Doth assign and transfer unto the said [*transferee*], All the said sum of £—— secured by the said recited indenture, and the interest henceforth to accrue due thereon, with the full benefit of the said recited security and of all other securities for the said sum and interest; Also the said messuages, lands, tenements and hereditaments so appointed by the said recited indenture as aforesaid, with their appurtenances; And all the estate, right, title and interest of the said [*mortgagee*], in or to the respective premises hereby assigned; To HOLD the respective premises hereby assigned unto the said [*transferee*], his executors, administrators and assigns, as to the said sum of £—— and interest, absolutely and beneficially, and as to the said mes-

—that principal money remains due, but that interest is paid up,

—that new lender has agreed to advance.

TESTATUM.

The mortgagee transfers the debt and interest, and the mortgaged premises

HABENDUM, —as to the debt and interest, absolutely,

—as to the mortgaged premises, for the residue of the term, subject to redemption.

suages, lands, tenements and hereditaments, with their appurtenances, for the unexpired residue of the said term of 500 years, subject to the right or equity of redemption subsisting by virtue of the said recited indenture.

Covenant by the mortgagee against incumbrances.

And the said [*mortgagee*], for himself, his heirs, executors and administrators, hereby covenants with the said [*transferee*], his executors, administrators and assigns, that the said [*mortgagee*], has not done or permitted any act, matter or thing whereby the respective premises hereinbefore assigned, or any part thereof, are, is or may be aliened, incumbered or prejudicially affected.

Appointment by the transferee, under a power in the mortgage, of new trustees.

And the said [*transferee*], in exercise of the aforesaid power given to the assigns (136) of the said [*mortgagee*], by the said recited indenture, Doth appoint the said [*trustees for transferee*] to be trustees for the purposes of the trusts and powers by the said recited indenture vested in the said [*trustees for mortgagee*], in the place of the last-named trustees.

Covenant by the mortgagor that the powers and covenants in the mortgage shall be available to the transferee and his trustees.

And the said [*mortgagor*] hereby declares, and also for himself, his heirs, executors and administrators, hereby covenants with the said [*transferee*], his executors, administrators and assigns, and also separately with the said [*trustees for transferee*], their heirs and assigns, that the powers and covenants contained in the said recited indenture, shall henceforth confer upon the said [*mortgagee*], his executors, administrators and assigns, and the said [*trustees for transferee*], their heirs and assigns, the same authorities, rights and remedies at law and in equity, as if the said [*transferee*] and the said [*trustees for transferee*] respectively had been the original donees and covenantees.

Approval and confirmation by mortgagor of the transfer and appointment.

And the said [*mortgagor*] approves of and confirms the assignment and appointment hereinbefore contained.

Further Testatum.

And this Indenture further Witnesseth, that in consideration of the sum of £—— paid by the said [*transferee*] to the said [*mortgagor*], on the execution of these presents, The said [*mortgagor*] hereby declares, and also for himself, his heirs, executors, and administrators, hereby cove-

(136) *Suprà*, 350, and n. (122).

nants with the said [*transferee*], his executors, administrators and assigns, that the said recited indenture, and all the provisions and covenants therein contained, shall henceforth stand as a security for, and extend to cover the principal sum of £——, being the aggregate amount of the said sum of £——, expressed to be secured by the same indenture, and the said sum of £—— advanced on the execution of these presents, and the interest of the said sum of £—— [*the aggregate amount*], so as to entitle the said [*mortgagee*] and [*mortgagor*] respectively, and their respective heirs, executors, administrators and assigns, in respect of the whole of the said sum of £——, [*the aggregate amount*], considered as an entire debt, and the interest thereof, to the same rights and remedies, legal and equitable. IN WITNESS, &c. (137)

Further charge.

(137) A further charge commonly assumes the shape of a covenant to pay at a given time, declaring also that the lands shall not be redeemable until satisfaction as well of the original debt as of the further advance; without adverting to the plight of the original security, as affected by the circumstance of the day of payment *therein* appointed being past or not. It is conceived, however, that the further charge should assimilate the security for the new advance to the security for the original debt, and be adapted to place the parties in the same relative condition as to both.

Form of further charge.

The writer cannot dismiss the subject of mortgages without an observation upon the practice—the established practice, indeed, with some provincial offices—of requiring the borrower to pay interest from the time when the money is *engaged* and ready to be advanced, or, in other words, from a period antecedent to the actual advance. The object is to protect the lender, who has engaged his money, from loss of interest in consequence of its remaining idle during the investigation of the title and the preparation of the securities. Sometimes, the money is placed to the joint account of the lender and borrower at a banking-house, or invested in Exchequer bills, which are deposited in their joint names; sometimes it remains in the order and disposition of the lender. In either way, the real character of the transaction is this, that, in consideration of a loan, the borrower engages to pay, besides the stipulated interest, an indemnification against a collateral inconvenience or loss. If the two payments, added together, *may* exceed five per cent. from the period of advance, the contract is illegal. Interest can be lawfully taken only for the *use* of money. The joint investment does

Practice of taking interest pending the completion of the loan.

No. 28.

CONVEYANCE, BY APPOINTMENT, *in Execution of a Power of Sale in a Mortgage.* [New Form, *founded on No.* 26.]

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, between [*transferee*], of, &c. of the first part, [*trustees for transferee*], of, &c. of the second part, [*mortgagor*], of, &c. of the third part, [*purchaser*], of, &c. of the fourth part, and [*trustee for purchaser*], of, &c. of the fifth part.

RECITALS, —of mortgage,

WHEREAS by an indenture, (138) bearing date the —— day of ——, in the year ——, and made between the said [*mortgagor*] of the first part, [*mortgagee*] of the second part, and [*trustees for mortgagee*] of the third part, in consideration of the sum of £——, paid by the said [*mortgagee*] to the said [*mortgagor*], All [*parcels*], with their appurte-

not appear to lessen the objection. It matters not that the lender is deprived, partially or wholly, of the use of the money, if the borrower does not obtain the control over it. Till the money is placed at the absolute disposal of the borrower there is no real loan. If the lender, retaining the money, suffer it to remain idle, it must be imputed to his folly or his caution; either he will not be at the trouble, or he will not incur the risk or the expense of a temporary investment. Weeks, months, even years may elapse before the title can be cleared and the securities completed; if the principle be admitted, no definite limit can be fixed, while the stimulus to despatch is weakened by the stipulation for interest. But the illegality of the practice is too clear for argument. The same observations apply to the investment or retention of part of the money to be paid over when some particular defect shall be removed, or (and this is not infrequent in building transactions) to be doled out as some building or improvement on the estate advances, taking interest in the meantime from the *intended* borrower for the sum so invested or retained, or, in other words, present interest for the future loan.

For much valuable practical information on the various modes of framing mortgage securities, and on the relative rights of mortgagor and mortgagee, the student is referred to the preliminary dissertation and notes to the title "Mortgage" in Mr. Jarman's elaborate work on conveyancing.

(138) *Vide suprà*, n. (134).

nances, were limited by the said [*mortgagor*] to the use of the said [*mortgagee*], his executors, administrators and assigns, for the term of 500 years, to be computed from the date thereof, without impeachment of waste, And, subject to the said term, to the use of the said [*trustees for mortgagee*], their heirs and assigns, in trust for the said [*mortgagee*], his heirs and assigns, subject to a declaration that the use thereinbefore limited to the said [*mortgagee*], his executors, administrators and assigns, and the use thereinbefore limited to the said [*trustees for mortgagee*], their heirs and assigns, should be deemed in equity to be so limited by way of mortgage only for securing to the said [*mortgagee*], his executors, administrators and assigns, the payment of the sum of £——, on the —— day of ——, in the year ——, and of interest for the same after the rate of £5 per cent. per annum, half-yearly, on the —— day of —— and the —— day of ——, without deduction. And by the said indenture, as a further and concurrent security for the said sum of £—— and interest, power was given to the said [*trustees for mortgagee*], and the survivor of them, his executors and administrators, at any time after the expiration of six calendar months from the said —— day of ——, in the year ——, at the request, in writing, of the said [*mortgagee*], his executors, administrators or assigns, and notwithstanding the dissent of the said [*mortgagor*], his heirs or assigns, to sell the said hereditaments, together or in parcels, by public auction or private contract, subject to such conditions as to the title and the evidence of title, and the mode and time of payment of the purchase-money, and other matters relating to the sale, as the said [*trustees*], or the survivor of them, his executors or administrators, should in their or his discretion think expedient; and power was also given to the [*mortgagee*], his executors, administrators and assigns, thereupon, by deed attested by one or more than one witness, to appoint the use of the hereditaments so sold (discharged from the limitations thereinbefore contained, from all right and equity of redemption, under the reciting indenture,) in such

manner as should be requisite or expedient for completing the sale. And the said [*mortgagor*] thereby declared that the receipts of the said [*trustees*], or the survivor of them, his executors or administrators, for the money to arise as aforesaid, should exempt the person or persons paying the same from all liability in respect of the application thereof. AND

—of transfer of mortgage,

WHEREAS by an indenture bearing date the —— day of ——, in the year ——, and made between the said [*mortgagee*] of the first part, the said [*mortgagor*] of the second part, the said [*transferee*] of the third part, and the said [*trustees for transferee*] of the fourth part, the said sum of £——, secured by the said recited indenture, and the interest thenceforth to accrue thereon, with the full benefit of the said recited security, and all other securities for the same sum and interest; also the said messuages, lands, tenements and hereditaments, so appointed by the said recited indenture as aforesaid, with their appurtenances, were assigned by the said [*mortgagee*] unto the said [*transferee*], his executors, administrators and assigns, as to the said sum of £——, and interest, absolutely and beneficially; and as to the said messuages, lands, tenements and hereditaments, with their appurtenances, for the then unexpired residue of the said term of 500 years, subject to the right or equity of redemption subsisting by virtue of the said recited indenture. And by the indenture now in recital, the said [*transferee*], in exercise of the aforesaid power given to the assigns (139) of the said [*mortgagee*], by the said recited indenture, appointed the said [*trustees for transferee*] to be trustees for the purposes of the trusts and powers by the said recited indenture vested in the said [*trustees for the mortgagee*], in the place of the last-named trustees. And the said [*mortgagor*] thereby approved of and confirmed the assignment and appointment thereinbefore contained. AND

—of sale by auction.

WHEREAS the said [*trustees*], at the request, in writing, of the said [*transferee*], caused the said messuages, lands, tenements

(139) *Suprà*, 358, and n. (123).

and hereditaments, to be put up to sale by public auction, at ——, on the —— day of —— last, in one lot; at which sale the said [*purchaser*] became the purchaser of the said hereditaments at the price of £——. NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £——, the purchase-money aforesaid, paid by the said [*purchaser*] to the said [*trustee for transferee*] on the execution of these presents, The said [*transferee*], in order to complete the aforesaid sale by the said [*trustee for transferee*], and in exercise of the aforesaid power for that purpose contained in the said recited indenture of the —— day of ——, [*mortgagee,*] Doth appoint That all the said messuages, lands, tenements and hereditaments comprised in the same indenture, with their appurtenances, shall henceforth be discharged from the uses by the same indenture limited thereof, and stand limited, To such uses as the said [*purchaser*] shall by any deed or deeds appoint; And in default of such appointment, To the use of the said [*purchaser*] and his assigns for his life, without impeachment of waste; and on the determination of his estate for life in his lifetime, To the use of the said [*trustee for purchaser*], his executors and administrators, during the life of and in trust for the said [*purchaser*] and his assigns; and on the determination of the lastly limited estate, To the use of the said [*purchaser*], his heirs and assigns for ever. And the said [*transferee*], for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his appointees, heirs and assigns, That he the said [*trustee for transferee*], has not done or permitted any act, matter or thing whereby the premises hereinbefore appointed, or any part thereof, are, is, or may be aliened, incumbered, or prejudicially affected. And the said [*mortgagor*] for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his appointees, heirs and assigns, That notwithstanding any act, matter or thing done or permitted by the said [*mortgagor*], or any person or persons lawfully claiming through or under him, to the contrary, the said

TESTATUM.

Transferee of mortgage appoints.

To uses to prevent dower in favour of the purchaser.

Covenant by transferee against incumbrances.

Qualified covenants by mortgagor for title.

[*transferee*] is well entitled by these presents to appoint the said hereditaments to the uses and in manner aforesaid; And also that at all times hereafter the same hereditaments may be quietly enjoyed and the rents and profits thereof may be taken accordingly, without any eviction or denial whatsoever by the said [*mortgagor*], or any person or persons lawfully claiming through or under him; Free from, or by the said [*mortgagor*], his heirs, executors or administrators, kept indemnified against all former and other estates, rights, titles and incumbrances created or occasioned by the said [*mortgagor*], or any person or persons claiming as aforesaid; And, lastly, that the said [*mortgagor*], and every person claiming as aforesaid, will, at the request and costs of the said [*purchaser*], his appointees, heirs or assigns, make and execute such acts, deeds and assurances, by appointment or otherwise, for better assuring the said hereditaments to the uses and in manner aforesaid, or otherwise, as the person or persons making such request shall reasonably require and shall tender to be done or executed.

No. 29.

RECONVEYANCE, *by* APPOINTMENT, *on Redemption of a Mortgage in Fee.* [A New Form, *founded on* No. 25.]

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*transferee of mortgagee*], of &c. of the first part; [*mortgagor*] of &c. of the second part; and [*trustees for mortgagor*], of &c. of the third part; WHEREAS, by an indenture bearing date the —— day of ——, in the year ——, and made between the said [*mortgagor*], of the first part; [*mortgagee*], of the second part; and [*trustees for mortgagee*], of the third part; in consideration of the sum of £—— paid by the said [*mortgagee*] to the said [*mortgagor*], All [*parcels*], with their appurtenants, were limited by the

Recitals, —of mortgage,

said [*mortgagor*], To the use of the said [*mortgagee*], his executors, administrators and assigns, for the term of 500 years, to be computed from the date thereof, without impeachment of waste, And subject to the said term To the use of the said [*trustees for mortgagee*], their heirs and assigns, In trust for the said [*mortgagee*], his heirs and assigns, Subject to a declaration that the use thereinbefore limited to the said [*mortgagee*], his executors, administrators and assigns, and the use thereinbefore limited to the said [*trustees for mortgagee*], their heirs and assigns, should be deemed in equity to be so limited by way of mortgage only for securing to the said [*mortgagee*], his executors, administrators and assigns, the payment of the sum of £——, on the —— day of ——, in the year ——, and of interest for the same after the rate of £5 per cent. per annum half-yearly, on the —— day of ——, and the —— day of ——, without deduction. And by the now reciting indenture, in order to facilitate the reconveyance of the said hereditaments on or after the redemption thereof, the said [*mortgagor*] empowered the said [*mortgagee*], his executors, administrators and assigns, or after such redemption, (whether the debt and interest should be paid at the time thereby appointed or not,) by deed attested by one or more than one witness, to appoint the use of the said hereditaments in such manner as should be requisite for effecting the purposes of such reconveyance. And Whereas by an indenture bearing date the —— day of ——, in the year ——, and made between the said [*mortgagee*], of the first part; the said [*mortgagor*], of the second part; the said [*transferee*], of the third part; and [*trustees for transferee*], of the fourth part; the said sum of £—— secured by the said recited indenture, and the interest thenceforth to accrue due thereon, with all benefit of the said recited security and all other securities for the same sum and interest; also the said messuages, lands, tenements and hereditaments so appointed by the said recited indenture as aforesaid, with their appurtenances, were assigned by the said [*mortgagee*] unto the said

—of transfer of mortgage.

[*transferee*], his executors, administrators and assigns, as to the said sum of £——, and interest, absolutely and beneficially, and as to the said messuages, lands, tenements and hereditaments, with their appurtenances, for the then unexpired residue of the said term of 500 years, subject to the right or equity of redemption subsisting by virtue of the said recited indenture. And by the now reciting indenture the said [*transferee*], in exercise of a certain power given to the assigns of the said [*mortgagee*], by the said recited indenture, appointed the said [*trustees for transferee*] to be trustees for the purposes of the trusts and powers by the said recited indenture vested in the said [*trustees for the mortgagee*], in the place of the last-named trustees. And by the now reciting indenture the said [*mortgagor*], in consideration of the sum of £——, then paid to him by the said [*transferee*], covenanted and declared that the said recited indenture should thenceforth stand as a security for the principal sum of £——, being the aggregate amount of the said sum of £—— advanced on the execution of the now reciting indenture, and the interest of the said sum of £—— [*the aggregate amount*].

TESTATUM. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £——, paid by the said [*mortgagor*] to the said [*transferee*], on the execution of these presents, in satisfaction of all principal money due to him upon the said recited mortgage security, (all interest due thereon having been paid by the said [*mortgagor*] to the said [*transferee*] up to, inclusively, the day of the date of these presents,) The said [*transferee*], at the request of the said [*mortgagor*], and in exercise of the aforesaid power of appointment contained in the said recited indenture of the —— day of ——, [*mortgagee*] Doth appoint that all the said hereditaments therein comprised and thereby appointed as aforesaid, shall henceforth remain, To such uses as the said [*mortgagor*] shall, by any deed or deeds, appoint, And in default of such appointment, To the use of the said [*mortgagor*] and his assigns for his life; And on the determination of his life estate in his lifetime, To the use of the said

Transferee appoints.

Uses to prevent dower.

Covenant by transferee against incumbrances.

[*trustee for mortgagor*], his executors and administrators, during the life of, and in trust for, the said [*mortgagor*]; And on the determination of the lastly limited estate, To the use of the said [*mortgagor*], his heirs and assigns for ever. And the [*transferee*], for himself, his heirs, executors and administrators, hereby covenants with the said [*mortgagor*], his appointees, heirs and assigns, that the said [*transferee*] has not done or permitted any act, matter or thing whereby the premises hereinbefore appointed, or any part theeof, are, is or may be aliened, incumbered, or prejucially affected. IN WITNESS, &c.

Assurances under the Statute 2 & 3 Will. 4, c. 74, for abolishing Fines and Recoveries. (140)

Dis-entailing Deeds.

No. 30.

CONVEYANCE, *by* DEED *of* GRANT, *by Tenant in Tail in Remainder, under a Protected Settlement, with the consent of the Protector.*

PARTIES.

THIS INDENTURE, made the —— day of ——, in the year of our Lord, 1835, Between [*protector*], of &c. of the

The statute 3 & 4 Will. 4, c. 74, does not prescribe forms of conveyance.

(140) The above statute has not enjoined the observance of any particular *form* of assurance. The conveyance of tenant in tail, whatever form it may assume, will be effectual to bar the estate tail, and, unless there be a protector who withholds his consent, to bar the remainders and reversion, provided it would have been adequate to pass the estate of the tenant in tail, if that estate had been a legal fee simple, and provided it be perfected by enrolment within six calendar months after the execution. (*Vide supra*, CHAP. V.) But although no legal necessity requires, yet convenience suggests the adoption of certain appropriate forms. The precedents here given are few, short, and simple; and they are added rather with the view of illustrating the observations already made upon the recent alterations in the law, (*suprà*, CHAP. V.) and affording opportunities for comment upon some practical points arising out of those alterations, than because the new statutes render it necessary to make any material change in the ordinary forms of conveyancing.

Effect of assurances by tenant in tail under the old law and the new law, stated and compared.

The effect of the fine and the recovery of a tenant in tail has already been contrasted with the effect of his assurance under the act (*suprà*, CHAP. V.) but the points in which the old and new law agree or disagree in principle will, perhaps, be more clearly apprehended from the following parallel; which, to those at least who are not familiar with the old learning, may be useful as an introduction to the precedents in the text.

Under the *old* law, —by recovery,

I. UNDER THE *OLD* LAW.—1. The recovery of a tenant in tail acquired a new fee-simple, discharged from the estate tail and from all posterior limitations.

—by fine.

2. The fine of A., tenant in tail *in possession*, with remainder or

first part; [*tenant in tail*], of &c. of the second part; and [*grantee to uses*], of &c. of the third part. WHEREAS by

reversion to B. in fee, barred the issue in tail absolutely, and acquired a *fee-simple* defeasible only by the remainder-man or reversioner, to whom there remained a mere *right* of action. If B. afterwards released to A., then the right to the remainder or reversion was extinguished, and A. had thenceforth a clear fee-simple founded, in point of title, upon the estate tail. 3. The fine of A., tenant in tail *in remainder*, with remainder over or reversion to B. in fee, barred the issue in tail absolutely, and acquired a *fee determinable* on failure of such issue, (or, in the language of the books, a *base fee*,) but did not divest or displace the remainder or reversion, which, therefore, continued to subsist as an *estate* expectant on the determinable fee. (*a*) If by any means the remainder or reversion of B. afterwards became vested in A., then the determinable fee merged in the remainder or reversion, and A. had, thenceforth, a clear fee-simple founded, in point of title, on the remainder or reversion. 4. The fine of A., tenant in tail, whether seised in possession or not, with the remainder or reversion in fee in *himself*, was attended with the same result as in the last example, namely, a fee-simple founded, in point of title, on the remainder or reversion.—In each of the three last positions, it is assumed that the fine was in fee and with proclamations.

II. UNDER THE *NEW* LAW.—1. Where A., tenant in tail, there being a protector of the settlement, makes an assurance under the act, with the consent of the protector, the assurance confers a new fee-simple, discharged from the estate tail, and from all posterior limitations. 2. Where A., tenant in tail, whether in possession or not, with remainder or reversion to B. in fee, there being a protector of the settlement, makes an assurance under the act, which, by reason of the non-consent of the protector, is insufficient to bar the remainder or reversion, the assurance bars the issue in tail, and acquires a fee *determinable* on failure of such issue, but does not divest or displace the remainder or reversion, which, therefore, continues to subsist as an *estate* expectant on the determinable fee. If, by any means, the remainder or reversion of B. afterwards becomes vested in A., the determinable fee does *not* merge in the remainder or reversion, as, upon ordinary principles, it would do, but is *enlarged* by the express provisions of the act, and A. has thenceforth a clear fee-simple founded, in point of title, upon the estate tail. 3. Where A., tenant in tail, whether in possession or not, with the remainder or reversion in fee in *himself* (in which case there is no protector of the settlement) making an assurance under the act, the result will be the same as in the last example, namely, a fee-simple gained by the

Under the new law, with consent of protector, —without consent of protector, —there being no protector.

(*a*) See 2 Prest. Conv. 275.

RECITALS, —of will, creating tenancy for life, with remainder in tail, remainders over.

virtue of the last will and testament of [*testator's name and description*], deceased, duly executed for passing freehold estates, bearing date the —— day of ——, in the year ——, and proved on the —— day of ——, in the same year, in the

enlargement of the determinable fee, and, consequently, founded, in point of title, upon the estate tail.—Thus, under the new law, the estate acquired will always be, either the clear fee simple, or a fee determinable on failure of the issue in tail and having the quality of a *particular* estate, on which an actual estate in remainder or reversion may be dependent or expectant, as distinguished from a fee-simple defeasible, which left merely a naked right to be asserted by a real action. The distinction is important in practice, inasmuch as the *estate* of the remainder-man or reversioner is alienable *inter vivos* and devisable, while the bare *right* was only descendible. To the particular estate thus created, the legislature has ascribed, not merely exemption from liability to merge in the expectant fee, but the capacity of absorbing, or rather of excluding by its expansion, that fee. Under the old law, there was an *extinction* of the *right* of the remainder-man or reversioner in the otherwise defeasible fee-simple; there was a *merger* of the determinable fee in the *estate* of the remainder-man or reversioner: while, under the new law, there is a merger (or what is, in the result, equivalent to a merger,) of the estate of the remainder-man or reversioner in the determinable fee.—In the examples above proposed, it must be assumed that the remainder or reversion in fee is *immediately* expectant upon the estate tail.

An estate tail in possession may be under *protection* and *è converso*.

It cannot be certainly inferred from the existence or non-existence of a protector that the estate tail is in possession or in remainder. Thus, if A. tenant for life, remainder to B. in tail, remainder over, surrender, (not as protector, expressly consenting to the alienation of tenant in tail,) his life estate to B., the estate tail of B. will be reduced into possession, but A. will continue protector. On the other hand, if A., tenant for the life of B., remainder to C. in tail, remainder over, die, the protectorship will determine, yet C. will continue to be tenant in tail in remainder.—(*Vide suprà*, Chap. V.) With respect to the appointment of a special protector, (*ib.*) the power given by the Act is a power of *substitution* only, which does not authorise the creation of a protectorship where none would otherwise exist. For this purpose the period of a life or lives in being and twenty-one years, during which period the remainders may be protected by the ordinary limitations in strict settlement, cannot be taken as an *absolute* or abstract period.

Power of appointing a protector is a power of *substitution*.

Prerogative Court of the Archbishop of Canterbury, the said [*protector*] is now tenant for life in possession of the manors, advowsons, messuages, lands, tenements, tithes and hereditaments hereinafter described, with remainder to trustees and their heirs, during the life of the said [*protector*], upon trust to preserve contingent remainders, with remainder to the said [*tenant in tail*], as the only son of the said [*protector*], in tail male, with remainders over. (141) NOW THIS INDENTURE WITNESSETH, that in order (142) to defeat the estate tail now vested in the said [*tenant in tail*] by virtue of the said will, in the hereditaments hereinafter granted, or intended so to be, and all estates, powers, rights and interest limited to take effect after the determination or in defeasance of such estate tail, and to limit the fee simple of the same hereditaments in remainder immediately expectant on the decease of the said [*protector*], to the uses and in the manner hereinafter expressed or referred to, The said [*tenant in tail*], with the

TESTATUM.

Object of assurance.

Tenant in tail, with the consent of the protector, grants.

(141) If the immediale remainder in fee were limited to the son, the consent of the protector would be unnecessary.—*Vide suprà*, Chap. V.

Consent of protector, when unnecessary.

(142) Even in the absence of an express indication of the purpose of the grantor, the conveyance will operate to discharge the land from the intail and remainders; and in the absence of an express limitation of the use, or of an express disposition exhausting the use, the resulting use (if not rebutted) will be in fee-simple; just as the use of a recovery suffered by tenant in tail resulted for a new estate in fee-simple. So, if the conveyance be made unto and to the use of a third person in fee, without disposing, or without completely disposing of the beneficial interest, the resulting trust will be of the fee-simple. But though it is clear that the estate tail and remainders may be effectually destroyed by an assurance absolutely silent in regard to its object, still it is proper to declare the intention, which may be done either by inserting the words " in order," &c., as introductory to the operative part of the assurance, according to the old form of a recovery deed, or by inserting the words " discharged from the estate tail, &c. and all estates, &c. limited," &c. at the close of the habendum. (*Vide infrà*, No. 31.) To refer to the Fine and Recovery act, which is not merely a " public," but a notorious act, seems to be altogether superfluous.

Resulting use or trust will be in fee simple.

consent (143) of the said [*protector,*] as protector of the settlement creating the said estate tail, Hath granted (144) and confirmed, and by these presents Doth grant and confirm unto the said [*grantee*] and his heirs, All [*parcels*], of all which hereditaments hereinbefore described, the said [*testator*] was seised in fee simple at the time of the making and publishing of his said will; And also all other the manors, advowsons, messuages, lands, tenements, tithes and hereditaments of which the said [*tenant in tail*] is now tenant in tail by virtue of the said recited will, together with all the rights, members and appurtenances to the said hereditaments belonging or appertaining; And all the estate, right, title and interest of the said [*tenant in tail*] in or to the said hereditaments and every part thereof, in remainder expectant as aforesaid. To HAVE AND TO HOLD the said manors, advowsons, messuages, lands, tenements, tithes and hereditaments hereby granted or intended so to be, with their appurtenances, unto the said [*grantee,*] and his heirs for ever; Nevertheless to such uses, for such estates intents and purposes, and in such manner as the said [*protector and tenant in tail*], by any deed or deeds to be executed by them in the presence of, and attested by one or more than one witness, shall jointly appoint; And in default of such appointment, and subject to the said power of appointment, To the uses, for the estates, and with and

HABENDUM, —to grantee in fee.

To such uses as protector and tenant in tail shall jointly appoint, and in default of appointment,

—to the old uses.

Protector need not convey.

(143) If the intention be to pass the estate of the protector, then he must of course be a *conveying* party; otherwise he will merely *consent*. (*Vide, infrà*, No. 31.)

Tenant in tail in remainder may convey by *grant*.

(144) As a remainder in fee lies in grant, the adoption of a lease and release would be justifiable only as providing against the possible event of the prior estate for life having determined by forfeiture or otherwise. The insertion of a nominal pecuniary consideration would render the deed, (though inrolled after six *lunar* months, if inrolled within six *calendar* months from the execution, 3 & 4 Will. 4, c. 74, s. 41,) effectual as a bargain and sale, but operating as such the uses expressed would be void as *legal* limitations, and it would be necessary to obtain a reconveyance from the bargainee, in whom the legal fee would be executed. (*Vide infrà*, n. 150.)

subject to the powers, provisions, and declarations, which immediately before the execution of these presents were subsisting or capable of taking effect concerning the same.(145) IN WITNESS, &c.

No. 31.

CONVEYANCE *by* LEASE *and* RELEASE, *by Protector, Tenant for Life, and his Son, Tenant in Tail in Remainder.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1834, Between [*protector*], of &c. of the first part, [*tenant in tail*], of &c. of the second part, and [*relessee*], of &c. of the third part. WHEREAS by indentures of lease and release and settlement, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release and settlement being made between [*father of protector*], and the said [*protector*], of the first part, [*wife of protector*], of the second part, [*trustees to preserve contingent remainders*], of the third part, and [*trustees of term*], of the fourth part, and being the settlement made in contemplation of the marriage of the said [*protector,*] with the said [*wife of protector*], the manors, messuages, lands, tenements, and hereditaments hereinafter described, and hereby released or intended so to be, with their appurtenances, were settled from and after the solemnization of the said then intended marriage, To certain uses for securing to the said [*protector*] and his assigns, during the joint lives of himself and the said [*protector's father*], a yearly rent-charge of £—— out of the said here-

Parties.

RECITALS, —of settlement on marriage of the father and mother of tenant in tail.

(145) This precedent supposes that the father and son contemplate some ulterior disposition, to which the assurance now made is only a preparatory step; the father, therefore, retains his controlling power. It is assumed that the intended disposition may be effected without disturbing the life estate of the father. (*Vide infrà*, No. 31, and note.) As the disentailing assurance must be inrolled, it may often be convenient or desirable to confine it to the primary object of acquiring the dominion over the fee.

Arrangement between father tenant for life, and son, tenant in tail, to resettle the estate.

ditaments, with the usual powers of distress and entry for enforcing payment thereof, And subject thereto, to certain uses for securing to the said [*wife of protector*], the then intended wife of the said [*protector*], and her assigns, for her natural life, if she should survive her then intended husband, the yearly-rent charge of £—— out of the said hereditaments with the usual powers of distress and entry for enforcing payment thereof, And subject to the said yearly rent-charges, and the remedies for the recovery thereof, To the use of the said [*trustees of term*], their executors, administrators, and assigns, for the term of 100 years from thenceforth next ensuing, without impeachment of waste, upon certain trusts for securing the said yearly rent-charges, and after the expiration or other sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof, To the use of the said [*father of protector*], and his assigns for his life, without impeachment of waste, remainder to the use of the said [*protector*], and his assigns for his life, without impeachment of waste, remainder to the use of the said [*trustees to preserve contingent remainders*] and their heirs for the life of the said [*protector*], upon trust to support and preserve the contingent uses and estates thereinafter limited, but to permit the said [*protector*] and his assigns during his life to receive the rents and profits of the said hereditaments, remainder to the use of the first and every other son of the said [*protector*] by the said [*wife of protector*], his then intended wife, successively in tail general, remainder or reversion to the use of the said [*protector*], his heirs and assigns.

—of marriage of father and mother of tenant in tail,

—that tenant in tail is the first son,

—his baptism,

—death of father,

death of mother.

And Whereas the said marriage was solemnized in the parish church of ——, on the —— day of ——, in the year ——. And Whereas the said [*tenant in tail*] is the first son of the said marriage, and was baptized at ——, on the —— day of ——, in the year ——. And Whereas the said [*father of protector*] died on the —— day of ——, in the year ——, and was buried at ——, on the —— day of ——, in the year ——, And Whereas the said [*wife of protector*], the

wife of the said [*protector*], died on the —— day of ——, in the year ——, and was buried at ——, on the —— day of ——, in the same year leaving the said [*protector,*] and the said [*tenant in tail*], surviving her. AND WHEREAS on the decease of the said [*father of protector,*] the limitation contained in the said recited indenture of release and settlement of the said yearly rent-charge of £—— determined, and on the decease of the said [*wife of protector*], the limitation therein contained of the said yearly rent-charge of £—— failed of effect, and by reason of such determination and failure (all arrears of the first-mentioned yearly rent-charge having been satisfied,) the said term of 100 years ceased by force of a proviso for the cesser thereof contained in the same indenture. AND WHEREAS the said [*protector*], and [*tenant in tail*] are desirous that the inheritance in fee simple in possession of the said manors, messuages, lands, tenements, and hereditaments, shall be limited to the uses and in manner hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that in order to defeat and destroy all estates tail of (146) the said [*tenant in tail*] in the manors, messuages, lands, tenements, and hereditaments hereinafter described or referred to, and all estates, rights, titles, interests and powers to take effect after the determination or in defeasance of such estates tail, and in order to assure and limit the inheritance in fee simple in possession of and in the same manors, messuages, lands, tenements, and hereditaments, to the uses and in manner hereinafter expressed, and in consideration of 10*s.* paid by the said [*relessee*] to each of them the said [*protector and tenant in tail*], on the execution of these presents, the receipt

—that rent-charges and term have ceased,

—of the desire of protector and tenant in tail to acquire the fee.

TESTATUM.

Object of assurance.

(146) The testatum of a recovery deed commonly ran thus, "in order to bar all estates tail now *vested* (1 Prest. Conv. 142), in the said, &c. and all *remainders and reversions* expectant or dependent thereon," &c.; but as all estates tail, whether vested or contingent, (*sed vide suprà*, Chap. V.), or divested and turned to a right, are barrable by an assurance under the act, the word "of" is substituted in the text for the expression "now vested in." As to "remainders and reversions," *vide infrà*, note (151).

Contingent and divested estates tail, barrable.

Protector and tenant in tail convey.

whereof is hereby acknowledged, The said [*protector*], and also the said [*tenant in tail*] with the consent of the said [*protector*], as protector of the settlement made by the said recited indentures, HAVE and each of them HATH granted, released and confirmed, And by these presents Do and each of them DOTH grant, release and confirm unto the said [*releasee*] and his heirs, (in the actual possession of the said [*releasee*], now being by virtue of a bargain and sale made to him by the said [*protector*(147) *and tenant in tail*], in consideration of *5s*, a piece, by indenture bearing date the day next before the day of the date of these presents, for one year computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession,) All [*parcels*], And also all other the manors, messuages, lands, tenements, and hereditaments of which the said [*tenant in tail*] is tenant in tail, or is entitled to be tenant in tail, by virtue of the said recited indentures; Together with all the rights, members and appurtenances thereunto belonging; And all the estate, right, title and interest of the said [*protector and tenant in tail*] respectively therein and thereto; TO HAVE AND TO HOLD the said manors, messuages, lands, tenements, hereditaments, and premises hereby released or intended so to be, with their appurtenances, unto the said [*releasee*] and his heirs for ever, (freed and discharged from the said estates tail, and all estates, rights, titles, interests and powers to take effect after the determination or in defeasance of the said estates tail;) Nevertheless, To such uses, upon such trusts, for such intents and purposes, subject to such powers and provisions, and generally in such manner, as the said [*protector and tenant in tail*], by any deed or deeds, revocable or irrevocable, to be executed by them in the presence of and attested by one or more than one witness, shall at any time or from time to time direct or

Actual possession clause.

Parcels.

All estate, &c.

HABENDUM,

—to releasee in fee,

—to such uses as protector and tenant in tail shall appoint,

Protector need not join in lease for a year.

(147) When the protector merely consents, his concurrence in the lease for a year is not necessary. (*Vide suprà*, n. 143.)

appoint; And in default of such direction or appointment, and subject to any partial direction or appointment, (148) To such uses, upon such trusts and for such intents and purposes, and with under and subject to such powers and provisions, as were subsisting concerning the said manors, messuages, lands, tenements, hereditaments and premises, by virtue of the said recited indentures, immediately before the execution of these presents, so as to revive and restore the former title; (149) And to, upon, or for no other use, trust, intent or purpose whatsoever. IN WITNESS, &c.

—to the old uses.

(148) If the estate is intended to be finally unfettered, the limitations may be, "To the use of the said [*protector*], and his assigns for his life, in restoration of the life estate limited to him by the said recited indentures, with the same powers and privileges as belonged to him immediately before the execution of these presents, and, after his decease, to the use of the said [*tenant in tail*], his heirs and assigns for ever." The declaration against dower may be added to the limitation of the remainder, or the fee may be limited to the uses to prevent dower, with the declaration superadded. *Vide suprà*, Chap. V. and *infrà*, n. (150).

Limitations restoring the life estate and power of protector, remainder in fee to tenant in tail.

(149) As the object, in this case, is supposed to be that of enabling the father and son to make an immediate resettlement of the estate on the intended marriage of the son, the father and son are made to join in conveying the fee simple in possession to such uses as they shall jointly appoint, and, subject to the power, to the old uses. If the estates were limited, in default of appointment, to the father for life, with remainder to the son in fee, and if circumstances should occur to prevent the intended marriage or the proposed resettlement, the destination of the estates might be very different from that contemplated by the parties, or at least by the father. It is also assumed that an immediate provision is intended to be made for the son, rendering it necessary to charge the father's life estate, which, therefore, is conveyed, in order that it may be subjected to the operation of the joint power; otherwise, it would be sufficient that the son, with the consent of the father, as protector, should grant the remainder. (*Vide suprà*, No. 30.) The father's life estate will be prevented from merging in the fee by the interposition of the estate limited, by the recited deeds, to the trustees to preserve contingent remainders. As that estate forms part of the legal ownership, it ought, in order to complete the legal title, to be conveyed to the uses of the intended disentailing deed. But this is little regarded in practice, and the trustees cannot be called upon to convey it till the remainders have been barred. As to the inrolment, *vide infrà*, n. (155.)

Observations on conveyance by protector, tenant for life, and his son, tenant in tail, preparatory to a settlement on the son's marriage.

No 32.

CONVEYANCE, *by* LEASE *and* RELEASE, (150) *by Tenant in Tail in Possession under an unprotected Settlement; his Wife joining to extinguish her Dower.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1835, Between [*tenant in tail*], of, &c. and [*christian name*], his wife, of the first part; and [*relessee to uses*], of, &c. of the other part. WHEREAS by indentures of lease and release, bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between [*father of tenant in tail*], of the first part; [*mother of tenant in tail*], of the second part; [*trustees to preserve contingent remainders*], of the third part; and [*trustees of term*], of the fourth part, and being the settlement made in contemplation of the marriage of the said [*father*] and [*mother*], which was solemnized at ——, on the —— day of ——, in the year ——, the manors, messuages, lands and hereditaments hereinafter released or intended so to

RECITALS, —of settlement on marriage of father and mother of tenant in tail, limiting the lands,

Conveyance by bargain and sale, how far eligible.

(150) Where the object of the conveyance is to vest the fee in a third person, a bargain and sale may be substituted for a lease and release. But the conveyance by bargain and sale cannot revest the estate in the bargainor, nor give effect to the common uses to prevent dower in favour of the bargainee, so far at least as regards the power of appointment. (*Vide suprà*, 286, n.) A purchaser, indifferent as to the power of appointment, and not having a wife to whom he was married *on or before* the 1st of January, 1834, may take a simple conveyance in fee by bargain and sale, with a declaration, under the Dower Act, 3 & 4 Will. 4, c. 105, s. 6, excluding dower. The declaration may immediately follow the habendum and be in this form:— "And the said [*purchaser*] hereby declares that no woman married to him after the 1st day of January, 1834, and becoming his widow, shall be entitled to dower out of the said hereditaments and premises hereby bargained and sold," or in the form suggested *suprà*, Chap. V. But, for some years to come, in order to render the fact of marriage on or before the 1st of January, 1834, immaterial to the future title, it will be better to insert the ordinary uses to prevent dower, as well as the declaration. Besides, the power of appointment is always valuable. On this subject, *vide suprà*, n. (79).

Form of declaration to exclude dower.

be, were limited, from and after the solemnization of the said then intended marriage, to the use of the said [*father*] and his assigns for his life, with remainder to the use of the said [*trustees to preserve*], and their heirs during the life of the said [*father*], upon trust to preserve the contingent remainders thereinafter limited, and after his decease, to the use and intent that the said [*mother*], if she should survive the said [*father*], and her assigns, might, during the remainder of her life, receive out of the rents and profits of the said hereditaments a yearly rent-charge of £—— for her jointure and in bar of dower, with the usual powers of distress and entry for enforcing payment thereof, with remainder to the use of the said [*trustees of term*], their executors, administrators and assigns for the term of 500 years, to be computed from the day of the date of the now reciting indenture of release, without impeachment of waste, upon the trusts therein declared for securing the said jointure-rent-charge and also for raising certain gross and annual sums of money for the portions and maintenance of the younger children of the said then intended marriage; and from and after the determination of the said term of 500 years, and in the meantime subject thereto and to the trusts thereof, to the use of the first and every other son successively of the said then intended marriage, in remainder one after another, in tail male, with reversion to the use of the said [*father*], his heirs and assigns for ever. And Whereas the said [*father*] died on the —— day of ——, in the year ——, leaving the said [*mother*] his widow, who is still living. And Whereas there was issue of the said marriage [*two*] sons, namely, the said [*tenant in tail*], who is the first son of the said marriage, and [*younger son*], also [*two*] daughters, namely, [*daughters*]. And Whereas the said [*tenant in tail*] attained the age of twenty-one years on the —— day of —— last. Now this Indenture Witnesseth, that in order to defeat the estate tail of the said [*tenant in tail*], by virtue of the said recited indentures, in the manors, messuages, lands and hereditaments, hereinafter de-

—to the father for life,

—to trustees to preserve, &c.

—to the intent that mother might receive a jointure rent charge,

—to trustees for 500 years, for securing jointure, and raising portions,

—to the first and other sons of the marriage in tail male,

—to father in fee,

—of death of tenant for life,

—of state of family,

—that tenant in tail attained twenty-one.

Testatum.

Objects of assurance.

scribed or referred to, and all estates, rights, interests, and powers to take effect after the determination or in defeazance (151) of such estate tail, and in order to extinguish the title of the said [*christian name*], the wife of the said [*tenant*

Efficacy of a recovery, communicated to an assurance under the act.

(151) A recovery acquired the fee, discharged, not merely from remainders and reversions, strictly such, but also from executory limitations,—a comprehensive class, embracing all those multifarious destinations which refuse obedience to the rules of the common law, (*vide suprà*, n. (22), (57)) and which, of course, were unknown at the period when a common recovery was first applied to the destruction of entails; yet, by a liberal construction of the judicature, proceeding on reasons of policy rather than principles of law, a common recovery barred or extinguished them all. The operation of an assurance under the Fine and Recovery Act, (the consent of the protector, if any, being obtained,) is, in these respects, equally searching and potent.

Effect of a recovery, and of its substitute, upon *executory* limitations.

The words of the act, "estates, &c. to take effect after the determination, or *in defeasance* of the estate tail," which have been adopted in the text, must be qualified in construction, as they would otherwise comprehend all limitations capable of divesting, abridging or charging the estate tail. Thus, if land be limited to the use of A. for life, with power of jointuring, remainder to B. in tail; or, to such uses as A. shall appoint, and, in default of appointment, to B. in tail;—the estate tail is vested, subject to be divested, partially or wholly, by an execution of the power, which power is, therefore, limited in "defeasance of the estate tail;" but a recovery would not have barred, nor will an assurance under the act bar the power. In considering the effect of a recovery, or of its substitute, with reference to *executory* limitations, questions suggest themselves which cannot be satisfactorily solved upon ordinary principles, nor can the operation of the assurance, in regard to such limitations, be referred to any sure and satisfactory test. The operation, in this respect, of the new assurance must, of course, be measured by the old standard of the common recovery. It should rather seem that the courts fell into the error of holding that the recovery of tenant in tail acquired the fee discharged from the executory limitation, instead of holding that the recovery acquired the fee defeasible, as before, by the executory limitation, or, in other words, merely enlarged the estate of the tenant in tail into a fee-simple; but leaving him, in respect of the fee-simple so acquired, in the same plight as that in which he stood in respect of the estate tail, so far as concerned the executory limitation,—a limitation engrafted on the fee generally, and not expectant or dependent on the estate tail, (*suprà*, (22), (57)). This error in principle is capable of producing considerable embarrassment.

in tail], to dower (152) out of the said manors, messuages, lands and hereditaments, and to limit the inheritance in fee-simple thereof to the uses and in manner hereinafter expressed, The said [*tenant in tail*] and [*christian name*], his wife, Have and each of them Hath granted and released, and by these presents Do and each of them Doth grant and release unto the said [*relessee*] and his heirs, (in the actual possession of the said [*relessee*], now being by virtue of a bargain and sale thereof made to him by the said [*tenant in tail*], in consideration of *5s.* by indenture bearing date the day next

Tenant in tail conveys.

Actual possession clause.

(152) *Vide suprà*, Chap. V. It may, perhaps, be thought that the act of 3 & 4 Will. 4, c. 74, s. 77, should have expressly mentioned *dower*. But the express mention of any particular species of interest, would not only have been a departure from the principle on which the act is framed, and properly framed,—that of employing terms at once definite and comprehensive—but have engendered doubts as to other species of interest not expressly mentioned. There was no more reason for particularizing dower, as one species of interest which a married woman might release, than for particularizing a power simply collateral as one species of limitation which a tenant in tail might bar. There cannot be a reasonable doubt that the section above referred to, taken in connection with the definition of the word, "estate," (s. 1,) or even unaided by that definition, includes dower. The question, therefore, if there be a question, must hinge upon the Dower Act, 3 & 4 Will. 4, c. 105. But that act, which, after admitting the wife, on the one hand, to dower out of estates not before subject to dower, and enabling the *husband*, on the other hand, to exclude dower by *his* alienation or declaration, simply provides (s. 14) "that *this* act shall not extend to the dower of any widow married on or before the 1st of January, 1834," and has, therefore, left the above *enabling* section of the act of 3 & 4 Will. 4, c. 74, in regard to alienation by married women, wholly untouched. The argument which seeks to prove that a title to dower attaching on or before the 1st of January, 1834, can neither be extinguished by the husband and wife under the Fine and Recovery Act, nor defeated by the husband under the Dower Act, amounts to this—that, if the Fine and Recovery Act extended to dower, yet when the Dower Act enabled the husband alone to exclude the dower of a wife taken *after* the 1st of January, 1834, it necessarily *abrogated* the power conferred upon the wife, in conjunction with the husband, by the Fine and Recovery Act, of releasing her title to dower; and *that*, as well in regard to women whose rights are within the Dower Act, as in regard to women whose rights are expressly excepted out of it.

The clause enabling married women to alien, by deed acknowledged, extends to *dower*.

before the day of the date of these presents, for one year computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession,) All [*parcels*] And also all other the manors, messuages, lands and hereditaments of which the said [*tenant in tail*] is tenant in tail by virtue of the said recited indentures; Together with all the rights, members and appurtenances to the said hereditaments and premises belonging or appertaining: and all the estate, right, title, interest, claim and demand whatsoever of the said [*tenant in tail*], in, to, out of, or upon the said hereditaments and premises; To HAVE AND TO HOLD the said manors, messuages, lands, hereditaments, and premises hereby released or intended so to be, with their appurtenances (subject to the said jointure-rent-charge of £——, limited by the said recited indentures to the said [*mother*] for her life, and the powers and remedies thereby given for enforcing the payment thereof, and to the said term of 500 years thereby limited to the said [*trustees of term*], and the subsisting trusts thereof), unto the said [*relessee*], and his heirs, To such uses(153) upon and for such trusts and purposes, and in such

Parcels.

All estate, &c.

HABENDUM.

(Subject to rent charge and term.)

To relessee in fee.

Uses to prevent dower.

Conveyance by tenant in tail to his own use sufficient.

Conveyance to uses by tenant in tail having no seisin.

(153) Although the estate be instantly revested in the tenant in tail, by limiting the use to himself, it is clear that he will acquire a new ownership, discharged from the limitations of the settlement, no less effectually than if he had so conveyed as to vest the estate in a third person, and had afterwards taken a reconveyance.—It is equally clear that a conveyance to uses will be effectual for the purposes of the act, notwithstanding that the conveying party has no legal *seisin*, as where the estate tail is equitable, or has been turned to a right or absolutely barred, though in such cases the assurance is merely formal; or rather the assurance proceeds upon the fiction of a legal tenancy in tail, for when the assurance is said to be *formal* it is not meant that the form of a lease and release, &c. as settled by practice, must be strictly pursued, since it is clear that the act would be satisfied by any instrument, however *informal*, which, if the tenant in tail were owner of the legal estate, would, under the circumstances of the title, operate substantially as a legal conveyance. It has been shown in a former note, (*vide suprà*, n. (73),) that the character of an assurance is not determined by its intrinsic form and ostensible purport.

manner as the said [*tenant in tail*] shall by any deed or deeds appoint, and in default of appointment, To the use of the said [*tenant in tail*], and his assigns, for his life, without impeachment of waste, and immediately after the determination of his estate in his lifetime, To the use of the said [*relessee*], his executors and administrators, during the life of the said [*tenant in tail*], In Trust for the said [*tenant in tail*] and his assigns, And immediately after the determination of the estate of the said [*relessee*], To the use of the said [*tenant in tail*], his heirs and assigns for ever. (154) In Witness, &c. (155)

(154) *Vide suprà*, n. (150), as to adding a declaration against dower.— The tenant in tail may, if he thinks fit, make a partial or limited disposition, as for years or for life, thereby barring the entail to the extent only of giving effect to such disposition; but every disposition made by him, either of the entire fee, or of an estate less than the fee, for a particular or limited *purpose*, as by way of mortgage, will depend for its effect *ultra* that purpose upon s. 21 of the act, on which some remarks have already been made, (*vide suprà*, Chap. V.) A tenant in tail intending to make a mortgage or other disposition of that nature, will probably be advised to acquire the fee by a previous assurance under the act, (*vides uprà*, n. (145)). If it be his wish that a mortgage or other disposition in fee, or for the life of the tenant in tail, made for a limited purpose, should operate in equity as a bar *pro tanto* only, he must either declare, by a *separate* deed, his intention to restrain its operation, or, what is the same thing in substance, resettle the equity of redemption to the old uses, which may be effected by a short reference to those uses, but as such resettlement may be deemed a *declaration* in contravention of the act, it should likewise be the subject of a separate deed.

Effect of mortgages and other partial dispositions by tenant in tail.

In considering this section of the act another point presents itself. If a tenant in tail suffered a recovery and limited the use to a mortgagee in fee, with a condition *avoiding* the limitation on payment of the money at a given time, it is clear that, on performance of the condition, the fee-simple gained by the *recovery* vested in the tenant in tail; but where a tenant in tail makes an assurance under the act, conditioned to be void *in toto* on a given act or event, it should seem that, after performance of the condition, nothing would remain to operate upon the entail, and that therefore a mortgage in fee intended to work an absolute bar should not be so conditioned, but that the proviso for redemption should direct a reconveyance.

Mortgage in fee to bar entail should not be conditioned to be *void*.

(155) The lease and release must be inrolled in the Court of Chancery

Inrolment and acknowledgment.

No. 33.

CONVEYANCE, *by Deed of* GRANT, *by a Tenant in Tail in Remainder, under a protected Settlement, without the Consent of the Protector; with a Covenant to perfect the Title at a future period.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1835, Between [*tenant in tail*], of, &c. of the one part, and [*purchaser*], of, &c. of the other part. WHEREAS under the last will and testament of [*testator's name and description*], deceased, bearing date the —— day of ——, in the year ——, duly executed for passing freehold estates, and proved in the Prerogative Court of the Archbishop of Canterbury, on the —— day of ——, in the year ——, [*protector*], of, &c. is seised in possession of the messuage or tenement and hereditaments hereinafter described, and hereby granted, or intended so to be, with the appurtenances, for his life, with remainder to the said [*tenant in tail*] and the heirs of his body, with remainder to [*remainder-man*] and the heirs of his body, with remainder to the said [*tenant in tail*], his heirs and assigns for ever. AND WHEREAS the said [*tenant in tail*] has issue [*number*] children now living, namely, [*names of children*]: (156) AND WHEREAS the said

Recitals,
—of will, devising freehold estates to one for life,
—to grantor in tail,
—to another in tail,
—to grantor in fee,
—of contract for sale,

within six calendar months after the execution, in order to be effectual as a bar to the estate tail, (*vide suprà*, Chap. V.) and the release must be acknowledged before a judge or a master in chancery, &c. in order to be effectual as a release of the dower (*ib.*). For forms of memorandum of acknowledgment, certificate of acknowledgment, and affidavit, *vide infrà*, p. 409, 410. A purchaser or mortgagee cannot safely pay his money till the assurance of tenant in tail is inrolled, nor without having ascertained by search that no previous assurance has been inrolled, for priority is given to the assurance first inrolled, (*vide suprà*, Chap. V.)

Inrolment gives priority.

(156) This fact is recited because during the existence of issue in tail, the enjoyment of the purchaser under this assurance will be secure, as its effect will be to convey a fee determinable on the failure of such issue. After the making of the assurance, the tenant in tail and his issue will retain

Effect of assurance by tenant in tail of a protected settlement, without consent.

[*tenant in tail*] has contracted with the said [*purchaser*] for the sale (157) to him of the remainder in fee simple immediately expectant on the decease of the said [*tenant for life*] in the said messuage or tenement and hereditaments, with the appurtenances, at the price of £——: AND WHEREAS the said [*tenant in tail*] cannot obtain the consent of the said [*tenant for life*], as protector of the settlement made by the said will to the alienation of the said remainder in fee, but the said [*purchaser*] has agreed to accept a conveyance (158) from the said [*tenant in tail*] without such consent, on his entering into a covenant (159) that he or his issue will perfect

—that consent of protector cannot be obtained,

—of agreement to accept conveyance from tenant in tail, with a covenant to perfect the title.

only the bare, unproductive and unalienable right of perfecting the title of the purchaser by an assurance under the act, to be made either during the protectorship, with the consent of the protector, or after the protectorship shall determine (*vide infrà*, No. 34); meanwhile the purchaser will be entitled to a "base fee," which he may alien by deed or will, and which, if it should become united in him with the immediate remainder in fee, by failure of the mesne remainder in tail, expectant on the estate tail of the vendor, would be enlarged (*vide suprà*, Chap. V.) into a fee simple.

Enlargement of base fee.

(157) It must be borne in mind that equity extends its peculiar protection to heirs expectant, and persons standing in that relation, by relieving against their improvident contracts, and consequently that all dealings with remainder-men in tail must be open to equitable scrutiny.

Sales, &c. by heirs expectant.

(158) The distinction which existed under the old law between the operation of the fine with proclamations, and of the recovery of a tenant in tail, the former barring the issue in tail only, the latter barring as well the issue in tail as every ulterior claimant, is abolished with the assurances themselves, except that the substituted assurance of a tenant in tail under a protected settlement, made *without the consent* of the protector, is so far assimilated to the operation of the fine, that it will not confer a title as against any estate or interest limited to take effect after or in defeasance of the estate tail, and to which the tenant in tail is not himself entitled. With this single exception, the substituted assurance will produce the full effect of a recovery, as a bar to estates tail and remainders.

Assurance under the act assimilated to a recovery, unless made without the consent of the protector.

(159) This covenant will not be of any force to bind the issue in tail or the remainder-men. (*Vide suprà*, Chap. V.) So far as regards their acts, it sounds merely in damages against the covenantor. In aid of the covenant,

Issue and remainder-men unaffected by the *covenant* of tenant in tail.

TESTATUM. the title of the said [*purchaser*] to the said remainder: Now THIS INDENTURE WITNESSETH, that in pursuance of the said recited contract, and in consideration of the sum of £——, of lawful British money paid by the said [*purchaser*] to the said [*tenant in tail*], on the execution of these presents, the receipt of which sum the said [*tenant in tail*] hereby acknowledges, and therefrom releases and discharges the said [*purchaser*], his heirs, executors, administrators and assigns,

Tenant in tail grants. The said [*tenant in tail*], in order as well to defeat his estate tail under the said will in the said messuage or tenement and hereditaments, and pass a base fee (160) in remainder immediately expectant on the decease of the said [*tenant for life*], as also to pass his ultimate remainder in fee simple under the aforesaid limitation to him, his heirs and assigns, Hath granted (161) and conveyed, and by these presents Doth grant and convey unto the said [*purchaser*], his heirs and assigns,

Parcels. All [*parcels*], Together with all the rights, members and appurtenances thereunto belonging; And also all the estate,

All estate, &c. right, title and interest of the said [*tenant in tail*], in or to

HABENDUM. the said hereditaments and premises; TO HAVE AND TO HOLD the said messuage or tenement, hereditaments and premises hereby granted or intended so to be, with their appurtenances, unto and to the use (162) of the said [*purchaser*], his

—to purchaser in fee. heirs and assigns, Subject to the estate for life of the said [*protector*], and the estates, rights, interests and powers, to take effect after the determination or in defeasance of the estate tail of the said [*tenant in tail*], other than the ultimate

a portion of the purchase-money may be impounded in the names of trustees, to be transferred to the tenant in tail or his issue, on completion of the title. *Vide infrà*, No. 34, by which this covenant is specifically performed.

(160) *Vide suprà*, Chap. V.

(161) *Suprà*, No. 30.

Suggestion in regard to conveyance by grant to uses. (162) When a valuable consideration is expressed, and uses are to be limited upon the seisin of the grantee, it may be prudent to insert the words "by way of grant at the common law, and not of bargain and sale," immediately before the operative words. *Vide suprà*, n. (150).

remainder so limited to him, his heirs and assigns, as aforesaid. And the said [*tenant in tail*], for himself, his heirs, executors and administrators, hereby covenants and agrees with the said [*purchaser*], his heirs, executors, administrators and assigns; that, notwithstanding any act, matter or thing done or permitted by the said [*tenant in tail*], or by the said [*devisor*], or any person or persons claiming through or under him to the contrary, the said [*tenant in tail*] is now well entitled to the said messuage or tenement, hereditaments and premises, with their appurtenances, for an estate tail in remainder expectant as aforesaid, with such remainders over as aforesaid; and also that notwithstanding any such act, matter or thing as aforesaid, the said [*tenant in tail*] now has in himself good right by these presents to grant or otherwise assure the said messuage or tenement, hereditaments and premises, with their appurtenances, in manner aforesaid; And also that the same messuage or tenement, hereditaments and premises shall or may be peaceably and quietly held, enjoyed and disposed of accordingly, without any eviction, interruption or denial from or by the said [*tenant in tail*], or any person or persons rightfully claiming or to claim any estate, right, title or interest, at law or in equity, through, under or in trust for him, or through or under the said [*devisor*]; Free and clear, or by the said [*tenant in tail*], his heirs, executors or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges and incumbrances created or occasioned by the said [*tenant in tail*] or the said [*devisor*] or any person or persons claiming or to claim through, under or in trust for the said [*tenant in tail*], or through or under the said [*devisor*], or by the act, default, privity or procurement of either of them; (except the estates, rights, interests and powers, subject to which the said hereditaments and premises are hereinbefore granted or intended so to be); And also, that the said [*tenant in tail*], and every person having or rightfully claiming or to claim any estate, right, title or interest, at law or in

Covenants by tenant in tail,

—that he is entitled to remainder;

—that he has right to convey;

—for peaceable enjoyment;

—for freedom from incumbrances;

—for further assurance;

equity, through, under or in trust for him, or through or under the said [*devisor*], (except claimants in respect of the estates, rights, interests and powers subject to which the said hereditaments and premises are hereinbefore granted or intended so to be), will at any time or times hereafter, at the request and costs of the said [*purchaser*], his heirs or assigns, do and execute every such act, deed, conveyance or assurance in the law whatsoever, for more effectually or satisfactorily granting, confirming or otherwise assuring the said messuage or tenement and hereditaments and premises, with the appurtenances, according to the true intent of the grant hereinbefore contained, as by the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required, and as shall be tendered to be done or executed. And moreover that the said [*tenant in tail*], or his issue in tail, will or shall, when enabled or competent in this behalf, at the request of the said [*purchaser*], his heirs or assigns, but at the costs of the said [*tenant in tail*], his executors or administrators, do and execute such acts, deeds and assurances for effectually defeating all estates, rights, interests and powers, to take effect after the determination or in defeasance of the estate tail of the said [*tenant in tail*] in the said messuage or tenement, hereditaments and premises hereby granted, or intended so to be, and perfecting the title of the said [*purchaser*], his heirs or assigns, to the inheritance in fee simple of and in the same messuage or tenement, hereditaments and premises, either in possession, or, as the case may be, in remainder immediately expectant on the decease of the said [*tenant for life*], as the said [*purchaser*], his heirs or assigns, or his or their counsel in the law shall reasonable require or advise. In Witness, &c. (163)

—to perfect title.

(163) As to inrolment, *vide suprà*, Chap. V. and n. (155).

No. 34.

CONVEYANCE, *by* BARGAIN *and* SALE, *by Heir in Tail, to perfect the Title of a Purchaser entitled to a Base Fee under the Assurance of the Ancestor, Tenant in Tail.* (164)

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*heir in tail*], of, &c. of the one part, and [*owner of base fee*], of, &c. of the other part. Parties.

WHEREAS, by indenture of grant, bearing date the —— day of ——, in the year 1834, and made between [*ancestor of heir in tail*], of the one part, and the said [*owner of base fee*], of the other part, and inrolled on the —— day of ——, in the same year, in the High Court of Chancery, after reciting that under the last will and testament of [*testator's name and description*], deceased, bearing date the —— day of ——, in the year ——, duly executed for passing freehold estates, and proved on the —— day of ——, in the year ——, in the Prerogative Court of the Archbishop of Canterbury, [*tenant for life*], of, &c. was seised in possession of the messuage or tenement and hereditaments therein and hereinafter described, and thereby granted or intended so to be, with the appurtenances, for his life, with remainder to the said [*ancestor*], and the heirs of his body, with remainder to [*remainder-man*], and the heirs of his body, with remainder to the said [*ancestor*], his heirs and assigns, for ever; And also reciting that the said [*ancestor*] had issue [*number*] children then living, namely, the said [*heir in tail*] and [*names of the other children*]; And also reciting that the said [*ancestor*] had contracted with the said [*owner of base fee*], for the sale to him of the remainder in fee simple immediately expectant on the decease of the said [*tenant for life*], in the

RECITALS, —of indenture of grant, by which ancestor of issue in tail conveyed a base fee.

(164) For an explanation of the state of the title to which this assurance is applicable, and its nature and operation, *vide suprà*, notes to No. 33. As to inrolment, *vide suprà*, n. (163).

said messuage or tenements and hereditaments, with the appurtenances, at the price of £——; And also reciting that the said [*ancestor*] could not obtain the consent of the said [*tenant for life*], as protector of the settlement made by the said recited will, to the alienation of the said remainder in fee, but that the said [*owner of base fee*], had agreed to accept a conveyance from the said [*ancestor*], without such consent, on his entering into a covenant that he or his issue would perfect the title of the said [*owner of base fee*] to the said remainder; It is witnessed, that in pursuance of the said contract, and for the valuable consideration therein mentioned, the said [*ancestor*], in order as well to defeat his estate tail under the said will in the said messuage or tenement and hereditaments, and pass a base fee in remainder immediately expectant on the decease of the said [*tenant for life*], as also to pass his ultimate remainder in fee under the aforesaid limitation to him, his heirs and assigns, Did grant and convey unto the said [*owner of base fee*], his heirs and assigns, All [*parcels*], with the appurtenances, To hold the same unto and to the use of the said [*owner of base fee*], his heirs and assigns, subject to the estate for life of the said [*tenant for life*], and the estates, rights, interests and powers, to take effect after the determination or in defeasance of the estate tail of the said [*ancestor*], other than the ultimate remainder so limited to him, his heirs and assigns as aforesaid; And by the said indenture now in recital, the said [*ancestor*] covenanted with the said [*owner of base fee*], his heirs, executors, administrators and assigns, that the said [*ancestor*], or his issue in tail, when enabled or competent in that behalf, would or should, at the request of the said [*owner of base fee*], his heirs or assigns, but at the costs of the said [*ancestor*], his executors or administrators, do and execute such acts, deeds, and assurances for effectually defeating all estates, rights, interests and powers to take effect after the determination or in defeasance of the estate tail of the said [*ancestor*] in the said messuage or tenement, hereditaments and

premises, thereby granted or intended so to be, and perfecting the title of the said [*owners of base fee*], his heirs or assigns, to the inheritance in fee simple of and in the same messuage or tenement, hereditaments and premises, either in possession, or, as the case might be, in remainder immediately expectant on the decease of the said [*tenant for life*], as by the said [*owner of base fee*], his heirs or assigns, or his or their counsel in the law, should be reasonably required or advised. AND WHEREAS the said [*ancestor*] died on the —— day of ——, in the year ——, leaving the said [*heir in tail*], his only [*or* eldest] son and heir in tail, surviving him: AND WHEREAS the said [*tenant for life*] died on or about the —— day of ——, in the year ——: And whereas the said [*heir in tail*] has consented specifically to perform the said recited covenant entered into by the said [*ancestor*]: NOW THEREFORE THIS INDENTURE WITNESSETH, that in consideration of 10*s.* paid by the said [*owner of base fee*] to the said [*heir in tail*] on the execution of these presents, the receipt whereof is hereby acknowledged, The said [*heir in tail*], in order to defeat all estates, rights, interests and powers limited to take effect after or in defeasance of the base fee into which the estate tail of the said [*ancestor*] was converted by the operation of the said recited indenture, and in order to perfect the title of the said [*owner of base fee*] to the inheritance in fee simple of the said messuage or tenement, hereditaments and premises, Hath bargained and sold, and by these presents Doth bargain and sell unto the said [*owner of base fee*] and his heirs, All the said messuage or tenement, hereditaments and premises comprised in the said recited indenture; Together with all the rights, members and appurtenances to the said hereditaments and premises belonging; And all the estate, right, title and interest of the said [*heir in tail*] in or to the said hereditaments and premises; TO HAVE AND TO HOLD the said messuage or tenement, hereditaments and premises, hereby bargained and sold, or intended so to be, with their appurtenances, unto and to

—of death of ancestor;

—of death of protector;

—that heir in tail has consented to perform the covenant of his ancestor.

TESTATUM.

Tenant in tail bargains and sells.

Parcels.

All estate, &c.

HABENDUM.

—to purchaser in fee.

Covenant by heir in tail that he has not incumbered.

the use of the said [*owner of base fee*], his heirs and assigns for ever. And the said [*heir in tail*], for himself, his heirs, executors and administrators, hereby covenants with the said [*owner of base fee*], his heirs and assigns, that the said [*heir in tail*] has not done or permitted any act, matter or thing whatsoever by which, or by means of which, the said messuage or tenement, hereditaments and premises hereby bargained and sold, or intended so to be, or any part thereof, with their appurtenances, are, is, or may be aliened, incumbered or prejudicially affected. In Witness, &c.

No. 35.

Assignment *by the Tenant in Tail of a protected Settlement, with the Consent of the Protector, of an entailed Money Fund.*

Parties.

This Indenture made the —— day of ——, in the year of our Lord 1834, Between [*protector*], of, &c. of the first part; [*tenant in tail*], of, &c. of the second part; and [*assignee*], of, &c. of the third part. Whereas by indentures of lease and release bearing date respectively the —— and —— days of ——, in the year ——, the indenture of release being made between [*father of tenant in tail, and protector of the settlement*], of the first part, [*mother of tenant in tail*], of the second part, [*trustees to preserve contingent remainders*], of the third part, and [*trustees of term*], of the fourth part, and being a settlement in contemplation of the marriage afterwards solemnized between the said [*protector*] and [*mother*], divers freehold hereditaments were limited, from and after the solemnization of the said then intended marriage, to the use of the said [*protector*] for his life, with remainder to the use of the said [*trustees to preserve*], and their heirs, during the life of the said [*protector*], upon trust to preserve the contingent remainders thereinafter limited, and after his decease

Recitals, —of settlement on marriage of the father and mother of tenant in tail,



To the use and intent that the said [*mother*], if she should survive the said [*protector*], might, during the remainder of her life, receive out of the rents and profits of the said hereditaments, a yearly rent-charge of £—— for her jointure and in bar of dower, with the usual powers of distress and entry for enforcing payment thereof, with remainder to the use of the said [*trustees of term*], their executors, administrators and assigns, for the term of 500 years, to be computed from the day of the date of the now reciting indenture of release, without impeachment of waste, upon the trusts therein declared for securing the said rent-charge, and for raising such gross and annual sums of money as therein are mentioned for the portions and maintenance of the younger children of the said then intended marriage, and from and after the determination of the said term of 500 years, and in the mean time subject thereto, to the use of the first and every other son successively of the said then intended marriage, in tail male, with reversion to the use of the said [*protector*], his heirs and assigns for ever; And which indenture of release contains a power enabling the said [*trustees to preserve*], with the consent in writing of the said [*protector*], to sell or exchange the said hereditaments or any of them, and to receive money for equality of exchange, and also contains a direction to invest the money to arise from sales, or to be received on exchanges, made under the said power, in the purchase of real estates to be settled to the uses limited by the same indenture concerning the said hereditaments thereby settled, and in the mean time to invest the same money in the names of the said trustees in or upon the public stocks or funds or other government securities, or on real securities in the United Kingdom, and also contains a declaration that the dividends, interest and yearly produce of the stocks, funds and securities in or upon which such investment should be made, should be paid and applied to the same persons and for the same purposes as the rents and profits of the estates directed to be

—containing power of sale and exchange;

—and directing monies arising from sales and exchanges to be laid out in lands to be settled to same uses, and in the meantime to be invested in stock or on mortgage;

purchased therewith as aforesaid, would, if so purchased, be payable or applicable. AND WHEREAS the said [*tenant in tail*] is the first son of the said marriage between the said [*protector*] and the said [*mother*] now his wife, and attained the age of twenty-one years, on the —— day of —— last, and there are several younger children of such marriage. AND WHEREAS several sales and exchanges have been made in pursuance of the aforesaid power contained in the said recited indenture of release, and the monies received from such sales and for equality of exchange upon such exchanges have been invested in the names of the said [*trustees*], partly in the public stocks or funds and partly on real securities; (165) And the investments thereof now consist of the

—that tenant in tail is the first son of marriage, and of age;

—of sales and exchanges, and investment of money.

Mode of assurance to be adopted by tenant in tail of a fund liable to be invested in land to be settled.

(165) The fund applicable to the purchase of land to be entailed may consist either of ready money, or money invested on securities &c., or of money to arise under a trust for sale impressed on real estate. If it consist of money invested, it matters not what is the nature of the investment. The same form will apply to stock, bonds, mortgages, whether for years or in fee, &c. The assignment operates, not upon the legal interest in the fund or security, but merely upon the equity created by the direction to purchase and settle the land; substituting for the equitable right to an estate tail in the land, an equitable right to the absolute property in the fund. If the fund consist of unsold real estate, not being copyhold or leasehold for years, then it must be operated upon by one or other of the modes of assurance adapted to unfetter freehold lands; if it consist of unsold real estate, being copyhold, the mode prescribed for barring the entail of copyhold lands must be pursued; and if it consist of chattels real, i. e. leasehold for years, an assignment is the appropriate assurance. The assignment, as well in the case of the money as in the case of the leaseholds for years, must be by *deed* inrolled within six calendar months after the execution. (3 & 4 Wm. IV. c. 74, s. 71.) These distinctions are attended with some complexity, but probably more difficulties presented themselves on considering the subject in all its bearings, than occur upon a cursory view, to the simple course of acting upon the fund, in every case, as if it were equitably converted into lands of freehold tenure, and conveying it under the denomination (employed by an eminent conveyancer) of "money-land," by an assurance adequate to pass freehold estates. Whether there is or is not a protector of the settlement, the tenant in tail must, in order to

particulars mentioned in the schedule hereunder written; [*or*, now consist of £—— Bank three per cent. consolidated annuities, &c.] NOW THIS INDENTURE WITNESSETH, that in order to defeat the estate tail of the said [*tenant in tail*], by virtue of the said recited indenture of release in the moneys, stocks, funds and securities hereby assigned or intended so to be, and all estates, rights, interests and powers to take effect after the determination or in defeasance of such estate tail, and to vest the absolute beneficial interest in the said moneys, stocks, funds and securities in the said [*tenant in tail*], subject to the limitations of the same indenture antecedent to the said estate tail, The said [*tenant in tail*], with the consent of the said [*protector*], as protector of the settlement creating the said estate tail, Hath assigned, and by these presents Doth assign (166) unto the said [*assignee*], his executors, adminis-

TESTATUM.

Object of assurance.

Tenant in tail with consent of protector, assigns.

unsettle the fund, adopt the same mode of assurance.—With respect to a *quasi* entail of leaseholds for lives, it may still be barred as heretofore by an ordinary deed; and with respect to leaseholds for years destined to attend, so far as the law will permit, the devolution of freeholds in strict settlement, since the absolute vesting cannot, by force of the limitations *per se*, be postponed beyond a life or lives in being and twenty-one years, no act is necessary to defeat the settlement. The act has, of course, no application to these *improper* entails (if they may be so termed) which were either destructible by a common conveyance or incapable from their own nature of exceeding the limit fixed by the rule against perpetuities: leaseholds for lives and for years are contemplated by the section in question only as constituting a fund devoted to the purchase of lands susceptible of a *proper* entail.

Estates *pur autre vie* and chattels real, how discharged from settlement.

(166) In point of fact nothing passes by the assignment—no legal interest, for the assignor has a mere equity—no equitable interest, for the assignee is not intended to take beneficially. Indeed, if the assignee *were* intended to take beneficially, still the assignment would be merely formal, since all dispositions of equitable rights operate by way of contract, and not of conveyance. The act says "an *assignment* by deed," and the form of assignment commonly adopted in practice for the transfer of personal estate is proper to be observed; but as the term "assignment" is very indefinite, (see 2 Black. Comm. 326,) the act seems to admit of considerable latitude in point of form.

The assignment of an entailed fund is purely formal.

trators and assigns, All the moneys which have been received from such sales, and for equality of exchange upon such exchanges as aforesaid, and all the stocks, funds and securities in or upon which the same moneys have been invested; And all other the monies which have been received or have arisen (167) from any sale or sales, or any exchange or exchanges, made in pursuance of the said power contained in the said recited indenture of release, and all the stocks, funds and securities in or upon such monies or any of them as have been invested; And also all the right, title and interest of the said [*tenant in tail*], in or to the said moneys, stocks, funds and securities hereby assigned or intended so to be. To HAVE AND TO HOLD the said moneys, stocks, funds, securities and premises hereby assigned or intended so to be, unto the said [*assignee*], his executors, administrators and assigns, as personal estate, discharged from the said estate tail, and all estates, rights, interests and powers to take effect after the determination or in defeasance of such estate tail, but subject and without prejudice to the limitations of the said recited indenture of release antecedent (168) to the said estate tail; To THE INTENT that the said [*assignee*] may, by the indenture of which the engrossment is already indorsed on the —— skin of these presents, re-assign (169) the same moneys, stocks,

HABENDUM, —to assignee, as personal estate,

—upon trust to re-assign.

The assignment of entailed fund inoperative upon a fund to arise *in futuro*.

(167) The assignment cannot be made to embrace the produce of *future* sales, &c. of the settled estate; but it may extend to the produce of sales, &c. for which contracts binding on the persons claiming under the settlement have been entered into.

Entailed fund subject to prior interests.

(168) The fund must, of course, remain in the hands of the trustees to answer the purposes of the prior limitations, and the operation of the assignment will be merely to acquire the absolute reversionary or expectant interest.

Assignment and re-assignment of entailed fund recommended.

(169) Though a re-assignment is clearly unnecessary for the purpose of discharging the fund from the entail, yet, by facilitating the receipt of the fund, the re-assignment may ultimately be attended with a saving of expense. If the fund were assigned in trust for the tenant in tail, the trustee of the fund would probably require a discharge from the assignee or his personal representatives. The expense of the re-assignment is trifling, and excludes

funds, securities and premises unto the said [*tenant in tail*], his executors, administrators and assigns, as his personal estate. (170) IN WITNESS, &c.

[*The Schedule above referred to.*]

RE-ASSIGNMENT.

[*To be Indorsed on No. 35.*]

THIS INDENTURE made the —— day of ——, in the year of our Lord 1834, Between the within-named [*trustee*] of the one part, and the within-named [*tenant in tail*] of the other part, (being the indenture referred to by the within-written indenture,) WITNESSETH that the said [*trustee*] Hath re-assigned, and by these presents Doth re-assign unto the said [*tenant in tail*], his executors, administrators, and assigns, All the moneys, stocks, funds, securities, and other the premises by the within-written indenture assigned to the said [*trustee,*] his executors, administrators, and assigns; And all the right, title, and interest of the said [*trustee*] in or to the same premises; TO HAVE AND TO HOLD the said moneys, stocks, funds, securities,

Parties.

TESTATUM.

Trustee re-assigns.

HABENDUM.

all occasion for resorting, at any future period, to the assignee or his representatives. The next best plan seems to be to assign upon trust to permit the tenant in tail, his executors, administrators or assigns, to receive the fund, with a declaration that his or their receipt shall be a discharge.

(170) The act directs leaseholds for years, and money, to be "*treated* as personal estate," (s. 71,) but this direction has reference to the mode of assurance only; and it seems proper to express in the assurance the election of the tenant in tail to take the fund, whether consisting of freeholds, leaseholds for lives or for years, or money, according to its *actual* character, and not according to its constructive equitable character. This precaution will exclude all questions between the real and personal representatives of the tenant in tail.—The assignment must be inrolled in the Court of Chancery within six calendar months after the execution. (*Vide suprà*, Chap. V.) It should be always borne in mind that the act does not dispense with registration, &c. required by other acts, as the Registry Acts and Bedford Level Act. The sections of the act in question, relating to inrolment, are, 41, 46, 59, 69, 71, 72, 73, 74.)

Election to take entailed fund in its actual state should be expressed.

Inrolment under 3 & 4 Will. 4, c. 74, not a substitute for registration, &c. under former acts.

—to tenant in tail as his personal estate.

and premises hereby re-assigned, or intended so to be (discharged as within expressed, but also subject as within expressed) unto the said [*tenant in tail*], his executors, administrators and assigns, as his personal estate. IN WITNESS, &c.

No. 36.

CONVEYANCE *by* LEASE *and* RELEASE, *by a Vendor married on or before the 1st January, 1834,* (171) *to a Purchaser; the Wife of such marriage joining to extinguish her title to Dower.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1834, BETWEEN [*vendor*], of &c. and [*christian name of wife*], his wife, of the first part, [*purchaser*], of &c. of the second part, and [*trustee for purchaser, to prevent dower*], of &c. of the third part: WHEREAS the said [*vendor*] has contracted with the said [*purchaser*] for the sale to him of the fee simple in possession, of which the said [*vendor*] is now seised, in the messuage, closes, and hereditaments hereafter described, and hereby released, or intended so to be, with the appurtenances, at the price of £——: AND WHEREAS the said [*christian name*], the wife of the said [*vendor*], has, in order to enable the said [*vendor*] to perform his said contract, consented to release her title to dower (172)

RECITALS, —of contract for sale,

—of wife's consent to release her dower.

Alienation by husband effectual against the dower of a wife taken *after* 1st Jan. 1834.

(171) Where the marriage is contracted *after* the 1st Jan. 1834, the alienation or devise of the husband will be effectual, under the dower act, 3 & 4 Will. 4, c. 105, ss. 4 & 5, to defeat the wife's dower. *Vide suprà*, Chap. V. It seems proper, though not necessary, to convey or devise in such cases, discharged, *expressly*, from dower.

Distinction between dower of wife taken *on or before*, and wife taken *after* 1st Jan. 1834.

(172) As to the competency of *every* married woman, (whether the marriage was contracted on or before the 1st of January, 1834, or after that day), to release her dower by a deed acknowledged according to the provisions of the act of 3 & 4 Will. 4, c. 74, *vide suprà*, Chap. V. and n. (152,) *suprà*. The practitioner should bear in mind that under the dower act, 3 & 4 Will. 4, c. 105, women marrying *after* the 1st January, 1834, will be entitled to dower *in equity*, and consequently that, in regard to such

out of the said messuage, closes, and hereditaments, and for that purpose to concur with him in the conveyance hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said contract, and in consideration of the sum of £——, of lawful British money, paid by the said [*purchaser*] to the said [*vendor*] on the execution of these presents, the receipt of which sum the said [*vendor*] hereby acknowledges, and therefrom discharges the said [*purchaser*], his heirs, executors, administrators, and assigns, The said [*vendor*] Hath granted, bargained, sold, and released, and by these presents Doth grant, bargain, sell, and release, and the said [*christian name*], the wife of the said [*vendor*], with his privity, hath remised, released, and quit-claimed, and by these presents doth remise, release, and quit-claim unto the said [*purchaser*] and his heirs (in the actual possession of the said [*purchaser*] now being by virtue of a bargain and sale thereof made to him by the said [*vendor*] in consideration of 5*s*. by indenture bearing date the day next before the day of the date of these presents, for one year computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute for transferring uses into possession): ALL [*parcels*], Together with all and singular the rights, members, and appurtenances thereunto belonging; and also all the estate, right, title, interet, claim and demand, at law or in equity, of the said [*vendor*] and [*christian name*], his wife, or either of them, in, to, out of, or upon the said hereditaments and premises, with their appurtenances; TO HAVE AND TO HOLD the said messuage, closes, hereditaments, and premises hereby released, or intended so to be, with their appurtenances, (discharged

TESTATUM.

Vendor conveys, and his wife releases.

Actual possession clause.

Parcels.

All estate, &c.

HABENDUM.

women, the usual limitations to prevent dower will be of no avail, that in order to exclude *their* dower, in *all* events, (*vide suprà*, n. 150,) a declaration must be inserted.—If the husband does but *contract* to purchase the inheritance, the newly enacted equitable dower will attach, subject to be defeated by the declaration of the husband by *deed* or will, or by his disposition *inter vivos* or by will. (*Vide suprà*, Chap. V.)

from the title to dower of the said [*christian name*], the wife of the said [*vendor*],) unto the said [*purchaser*,] his heirs and assigns for ever: Nevertheless, To and for such uses, estates and purposes, and in such manner as the said [*purchaser*] by any deed or deeds shall appoint, and in default of such appointment, To the use of the said [*purchaser*] and his assigns during his life, without impeachment of waste, and after the determination of his estate in his life-time, To the use of the said [*trustee*], his executors and administrators during the life of, and in trust for, the said [*purchaser*], and his assigns, and after the determination of the hereinbefore lastly limited estate, To the use of the said [*purchaser*], his heirs and assigns for ever. (173) And the [*vendor*] for himself, his heirs, executors and administrators, hereby covenants with the said [*purchaser*], his heirs and assigns, that these presents shall forthwith, at the costs (174) of the said [*vendor*] be duly acknowledged by the said [*christian name*], his wife, she hereby consenting, and otherwise perfected with the solemnities (175) prescribed by law for rendering the deeds of married women effectual to extinguish their interests in land; And also that, notwithstanding any act, matter, or thing done or permitted by the said [*vendor*], and [*christian name*] his wife, or either of them or by any person or persons claiming under or in trust for them or either of them, to the contrary, the said [*vendor*] and [*christian name*] his wife, now have in themselves by these presents, being perfected as aforesaid, or the said [*vendor*] now has in himself by these presents good right to assure and limit the inheritance in fee simple in possession of the said messuage, closes, hereditaments and premises, to the uses and in manner aforesaid; And also that the said hereditaments and premises, with the appurtenances, and the rents and profits thereof, shall and may at all times hereafter be

Uses to prevent dower.

Covenants by vendor, that wife shall acknowledge the deed, &c.;

—for right to convey;

—for quiet enjoyment;

(173) For a form of *declaration* against dower, see n. 152, *suprà*.

(174) *Vide suprà*, Chap. V.

(175) *Vide suprà*, Chap. V, and n. (155,) *infrà*, No. 37, and notes.

peaceably and quietly enjoyed accordingly, without any interruption or denial from or by the said [*vendor*] and [*christian name*], his wife, or either of them, or any person or persons rightfully claiming or to claim under or in trust for them, or either of them; Free and clear, or by the said [*vendor*], his heirs, executors, or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances created by the said [*vendor*] and [*christian name*], his wife, or either of them, or any person or persons claiming or to claim under, or in trust for them or either of them, or by their or either of their act, default, or procurement; And, lastly, that the said [*vendor*] and [*christian name*], his wife, and every person rightfully claiming or to claim under or in trust for them or either of them, will, at any time or from time to time hereafter, at the request and costs of the said [*purchaser*], his appointees, heirs, or assigns, do and execute every such act or assurance for more effectually assuring the said hereditaments and premises, or any part thereof, to the uses aforesaid, or otherwise according to the direction of the said [*purchaser*], his appointees, heirs, or assigns, as by him or them, or his or their counsel in the law shall be reasonably required or advised, and as he or they shall tender to be done or executed. IN WITNESS, &c.

—for freedom from incumbrances;

—for further assurance.

No. 37.

RELEASE *by a Married Woman of her title to Dower, in Performance of the Husband's Covenant with a Mortgagee, to levy a Fine.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 1835, Between [*mortgagor*], of, &c. and [*christian name of wife*], his wife, of the one part, and [*mortgagee*], of, &c. of the other part. WHEREAS by indentures of lease and release, bearing date respectively the —— and —— days of ——, in the year 1834, the indenture of release being made

Parties.

RECITALS,

—of mortgage in fee,

between the said [*mortgagor*] and [*christian name*], his wife, of the one part, and the said [*mortgagee*], of the other part; All [*parcels*], with their appurtenances, were conveyed and assured by the said [*mortgagor*] unto and to the said [*mortgagee*], his heirs and assigns, subject to a proviso therein contained for redemption of the said hereditaments and premises, and for the reconveyance thereof unto the said [*mortgagor*], his heirs and assigns, or as he or they should direct, on payment by the said [*mortgagor*], his heirs, executors, administrators or assigns, to the said [*mortgagee*], his executors, administrators or assigns, of the sum of £——, with interest for the same after the rate of £4 per cent. per annum, on the —— day of ——, then and now next ensuing; And the said indenture of release contains a power enabling the said [*mortgagee*], his heirs or assigns, after such default in payment of the said sum of £——, or the interest thereof, and after the expiration of such notice as therein mentioned, to sell the said hereditaments and premises, and out of the produce of the sale thereof to satify the said sum of £——, with all interest and costs; And by the same indenture the said [*mortgagor*] covenanted with the said [*mortgagee*], his heirs, executors, administrators and assigns, that the said [*mortgagee*] and [*christian name*], his wife, (she thereby consenting,) would, in or as of the then last —— term, the then next —— term or any subsequent term, at the request of the said [*mortgagee*], his heirs, executors, administrators or assigns, acknowledge and levy unto the said [*mortgagee*], his heirs and assigns, before his majesty's justices of the Court of Common Pleas at Westminster, one or more fine or fines sur conuzance de droit come ceo, &c. with proclamations, of the said hereditaments and premises, by such names and descriptions as should be sufficient to comprise the same, which fine, it was thereby declared, should enure to the use of the said [*mortgagee*], his heirs and assigns for ever, nevertheless subject to the aforesaid proviso for redemption and reconveyance; And Whereas no fine has been levied pursuant to

—with power of sale,

—and covenant by mortgagor that he and his wife would levy a fine,

—that no fine has been levied.

the said recited covenant; AND WHEREAS the only object (176) intended to be effected by the fine so covenanted to be levied as aforesaid, was the extinguishment of the title of the said [*christian name*], the wife of the said [*mortgagor*], to dower out of the said hereditaments and premises: NOW THIS INDENTURE WITNESSETH, that in performance (177) of the aforesaid covenant contained in the said recited indenture of release, The said [*mortgagor*] and [*christian name*], his wife, Have and each of them Hath remised, released, quit-claimed and confirmed, and by these presents Do and each of them Doth remise, release, quit-claim and confirm unto the said [*mortgagee*], his heirs and assigns, All the said messuage, &c. and other the hereditaments and premises comprised in the said recited indentures; together with all the rights, members and appurtenances thereunto belonging; To THE INTENT that the title of the said [*christian name*], the wife of the said [*mortgagor*], to dower out of the said hereditaments and premises, may be

—that the only object of the fine was the extinguishment of the wife's dower.

TESTATUM.

Husband and wife release.

Parcels.

INTENT that wife's dower may be extinguished.

(176) If the intention of the fine or recovery covenanted or agreed to be levied or suffered cannot be completely effected by an assurance operating according to the provisions of the act of 3 & 4 Will. 4, c. 74, in regard to alienation by tenants in tail and married women, (as, for example, if the fine was intended to operate as a bar by non-claim, *vide supra*, Chap. V.) then it becomes necessary (s. 3) to insert a special declaration, which (adopting the words of that section) may be in this form, "And the said [*intended conusors in the fine, or vouchees in the recovery,*] hereby declare it to be their desire that this deed shall have the same operation and effect as the fine [*or*, recovery,] covenanted [*or*, agreed,] by the said indenture to be levied, [*or*, suffered,] would have had if the same had been actually levied [*or*, suffered]." Indeed, the insertion of such a declaration seems to be proper in every case where the extraordinary effect to be communicated by the declaration would not, by occasioning a forfeiture or otherwise, prove injurious to the title. If this suggestion be adopted, the recital to which this note is appended should of course be omitted, and the declaration should immediately precede the covenant.

Effect of assurances in performance of covenants or agreements to levy fines or suffer recoveries.

(177) The act converts the covenant or agreement to levy a fine or suffer a recovery into a covenant or agreement to make the substituted assurance, so that the assurance is properly said to be made in *performance* of the covenant or agreement.

Assurance under the act satisfies covenant to levy a fine.

Declaration that extinguishment of dower shall be absolute.

extinguished. And it is hereby declared by the said [*mortgagor*] and [*christian name*], his wife, that the release hereinbefore contained shall operate as an absolute extinguishment of the dower of the said [*christian name*], the wife of the said [*mortgagor*], out of the said hereditaments and premises, for the benefit, as well of the said [*mortgagee*], his heirs and assigns, in respect of the said recited mortgage security, as of the said [*mortgagor*], his heirs and assigns, in respect of the equity of redemption. (178)

Covenant by husband that wife shall acknowledge the deed, &c.

And the said [*mortgagor*], for himself, his heirs, executors and administrators hereby covenants with the said [*mortgagee*], his heirs, executors, administrators and assigns that these presents shall forthwith, at the costs of the said [*mortgagor*], be duly acknowledged by the said [*christian name*], his wife, and perfected in other respects with the solemnities (179) prescribed by law for rendering the deeds of married women effectual to extinguish their interests in land; (180)

—that husband and wife have not done any act to prevent the release from taking effect.

And also that the said [*mortgagor*] and [*christian name*], his wife, have not nor has either of them done or permitted any act, matter or thing by which or by means of which the release hereinbefore contained may be prevented from taking effect according to the true intent thereof. In Witness, &c.

(178) This clause is inserted to exclude the questions which have arisen upon fines levied by husband and wife of his inheritance, for the purpose of mortgaging in fee, in respect of her dower *ultra* the mortgage. 6 Jarm. Conv. 174.

(179) *Vide supra*, n. (175).

(180) If the object of the deed is to convey the wife's estate, say "effectual to pass their estates in land."

RULES

OF THE

COURT OF COMMON PLEAS

CONCERNING

THE ACKNOWLEDGMENT OF DEEDS

BY

MARRIED WOMEN.

RULES

OF

THE COURT OF COMMON PLEAS,

WITH

THE FORMS

PRESCRIBED BY THE ACT OF 3 & 4 WILL. 4, C. 74, AND BY SU
ORDERS, RELATIVE TO THE

ACKNOWLEDGMENT, &c. OF DEEDS BY MARRIED WOMEN. (1) (a)

REGULÆ GENERALES. (2)

MICHAELMAS TERM, 1833.

WHEREAS by the 84th section of the statute made in the 3rd a
4th years of the reign of his present majesty, chapter 74, intitul
"An Act for the Abolition of Fines and Recoveries, and for t
Substitution of more simple modes of Assurance," the Court
Common Pleas is authorized from time to time to make alterations
the memorandums and certificates in the said section mentioned. (3)

And Whereas, by the 89th section of the said Act, it is enacte
that the Lord Chief Justice of the Court of Common Pleas at Wes
minster, shall from time to time appoint the person who shall be t
officer with whom such certificates as in the said Act are me
tioned shall for the time being be lodged, and may remove him
pleasure, and that the Court of Common Pleas at Westminster sha
also from time to time make such orders and regulations as the sa
Court shall think fit, touching the mode of examination to be pu
sued by the commissioners to be appointed under the said Act, an

(a) The numerals refer to the notes which immediately follow the Rule
These notes were written as and when the Rules were successively pr
mulgated, and are printed in the order in which they were written.

touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place: Now it is Ordered, that in addition to the form of the certificate mentioned in the 84th section of the said Act, (4) after stating the names of the parties and the words, "and acknowledge the same to be her act and deed," the following words should be inserted, "And I (or We) do further certify, that the several premises comprised in the said indenture are situate in the parish or several parishes and place or places following, that is to say, in the parishes of ——, (as the case may be) in the county of ——." (5)

And it is further Ordered, that where the acknowledgments shall be made before the commissioners appointed under the said Act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor or agent of any of the parties in the transaction giving occasion to the taking (of) such acknowledgment, and that in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, (6) that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons (7) making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor or agent, or clerk to the attorney, solicitor or agent of any of the said parties, (8) and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be mentioned in such affidavit.

And it is further Ordered, that the commissioners do inquire of married women whether they intend to give up their interest (9) in the estate to be passed by such deed, without having any provision made for them in return for, or in consequence (10) of their so giving up such interest, and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made; (11) and one of the said commissioners shall state in the affidavit so to be made as aforesaid, that such inquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made, and where such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

And it is hereby further Ordered, that the affidavits verifying st certificate, where the acknowledgment is taken by a judge or maste Chancery, be in the form hereunto annexed marked (A.) and where l fore any of the commissioners appointed in pursuance of the said act, the form hereunto annexed, marked (B.), with such variations or as the circumstances of the case shall render necessary.

And it is hereby further Ordered, that the certificates and the affidav verifying the same shall be delivered to the officer to be so appoint within one *month* from the making the acknowledgment, and that t officer shall not receive the same after that time, without the directi of the court or a judge.

N. C. TINDAL.
S. GASELEE.
J. B. BOSANQUET.
E. H. ALDERSON.

Form of MEMORANDUM OF ACKNOWLEDGMENT, *to b indorsed on, or written at the foot or in the margin of the Deed, an signed by the Judge, Master in Chancery, or Commissioners takin the Acknowledgment.*

THIS DEED, marked (*here add some letter or mark, for the purpose o identification,*) [A] was this day produced before me, (*or* us,) and ac knowledged by [*Jane Ball*] therein named, (12) to be her act and deed previous to which acknowledgment the said [*Jane*] was examined by me, (*or* us,) separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her.

Form of CERTIFICATE *to be written or engrossed on a separate piece of parchment, and signed by the Judge, Master in Chancery, or Commissioners.*

THESE are to certify, that on the [1*st*] day of [*January*], in the year 1835, before me, the undersigned Sir Nicolas Conyngham Tindal, Knight, Chief Justice of the Court of Common Pleas at Westminster, (*or* before me, Sir James Parke, Knight, one of the justices of the Court of King's Bench, at Westminster, *or* before me, the under signed James William Farrer, one of the Masters in Ordinary of the Court of Chancery; *or*, before us, [*John Hall* and *Luke Ord*], two of the perpetual commissioners appointed for the [*borough of Leicester*], for taking the acknowledgments of deeds by married

women, pursuant to an act passed in the third and fourth years of the reign of His Majesty King William the Fourth, intituled An Act (*insert the title of the act*),(13) *or*, before us, the undersigned [*John Duke* and *James Ash*], two of the commissioners specially appointed, pursuant to an act passed in the third and fourth years of the reign of his present Majesty King William the Fourth, intituled An Act (*insert the title of the act*), for taking the acknowledgment of any deed by [*Jane*], the wife of [*Francis Long*], appeared personally [*Jane*], the wife of [*Francis Long*], and produced a certain indenture (14) marked [A], bearing date the [1*st*] day of [*January*, 1835], and made between (*insert the names of the parties*), and acknowledged the same to be her act and deed; "And I, (*or* we,) do further certify that the several premises comprised in the said indenture, are situate in the several parishes and places following, (that is to say,) in the parish of [*Dale, &c.*] (as the case may be,) in the county of" [*Lincoln*]. (15) And I (*or* we) do certify that the said [*Jane*] was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me (*or* us,) apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented unto the same.

Form of AFFIDAVIT,(16) *verifying the Certificate where the Acknowledgment is taken before a Judge or Master in Chancery.*

A. [*James Hall*], of [*Barnet, in the county of Herts, gentleman*], maketh oath and saith, That he knows [*Jane*], the wife of [*Francis Long*], in the certificate hereunto annexed mentioned: And that the acknowledgment therein mentioned was made by the said [*Jane*], and the said certificate signed by the said [*James William Farrar*], (*judge or master*), therein mentioned, in the presence of this deponent: And this deponent further saith, That the said [*Jane*] was, at the time of making such acknowledgment, of full age and competent understanding.

Form of AFFIDAVIT, *verifying the Certificate, where the Acknowledgment is taken by any of the Commissioners appointed in pursuance of the Act of Parliament.*

B. [*John Grant*], of [*Maidstone, in the county of Kent, gentleman*], one of the attorneys of his Majesty's Court of [*King's Bench*], at Westminster, and one of the commissioners named in the certificate

hereunto annexed, maketh oath and saith, that he knows [*Jane*], the wife of [*Francis Long*], in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said [*Jane*], and the certificate signed by the commissioners in the said certificate mentioned on the day and year therein mentioned, at [*Maidstone aforesaid*], in the presence of this deponent, and that at the time of making such acknowledgment, the said [*Jane*] was of full age and competent understanding: And that the said [*Jane*] knew the same acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made: And this deponent further saith, that he, this deponent, (17) (or the said *I. K.*, as the case may be, adding, if not the commissioner making the affidavit, whose place of residence is at *Tunbridge*, in the said county), is not concerned as the attorney, solicitor or agent, or clerk to the attorney, solicitor or agent, of any or either of the parties to the transaction, giving occasion to the taking such acknowledgment: And this deponent further saith, that in pursuance of the order made by the Court of Common Pleas, in Michaelmas Term, 1833, the said commissioners did inquire of the said [*Jane*], (or if more than one, of each of them, the said *Jane and Mary*],) whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in return for, or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry, the said [*Jane*] declared that she did intend to give up her interest in the said estates, without having any provision made for her in return for, or in consequence of her so giving up her interest, which declaration of the said [*Jane*] this deponent has no reason to doubt the truth of, and verily believes the same to be true, (or declared that a provision was to be made for her in consequence of her giving up her interest in the said estates): And this deponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made. (18)

N. B.—When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of *it*.

REGULÆ GENERALES. (19)

HILARY TERM, 1834.

"WHEREAS it has been found expedient to make alterations (20) in the general rules made in Michaelmas term last by this court, for the purpose of carrying into effect the statute passed in the 3d and 4th years of the reign of his present majesty, cap. 74, intituled 'An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance.'

"AND WHEREAS it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution (21); and it will be convenient that all the orders and regulations made by the court under the said act should be contained in the same rule:—

"NOW IT IS HEREBY ORDERED that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which before the first day of March next ensuing, shall have been taken pursuant to the direction of the said rules of Michaelmas term last. (22)

"AND IT IS HEREBY FURTHER ORDERED, that where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor or agent, or as clerk to any attorney, solicitor or agent so interested or concerned. (23)

"AND IT IS FURTHER ORDERED, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such *one* of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive

the said acknowledgment; but if it shall appear to them or to such *one* of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before then, the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof. (24)

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed) (*a*), be made by some practising attorney or solicitor of one of the Courts at Westminster, or of one of the Counties Palatine of Lancaster or Durham, (25) and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent (or if more than one person join in the affidavit), that one or more of the deponents knew the person or persons making such acknowledgment; and that at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding: (26) and that one at least of the commissioners taking such acknowledgment, to the best of his deponent's knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein, as attorney, solicitor or agent, or as clerk to any attorney, solicitor or agent so interested or concerned; and that (27) the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: And that previously to such acknowledgment being taken, the deponent (28) had inquired of such married woman (or, if more than

(*a*) The writer has received a communication from an able provincial counsel, which contains the following passage:—"In the borough of Berwick-upon-Tweed, they have never had fines or recoveries—married women have passed and barred their estates and rights by deeds acknowledged in their local courts, and estates tail have been barred by feoffment and re-enfeoffment. [So in the Isle of Man by sale and resale.] There was, in fact, no cursitor for Berwick—does the act apply to lands in Berwick? The chief justice has appointed commissioners, there being, I assume, a clerk of the peace. May a feme covert pass her lands in *Scotland* under the act? See s. 77, 82. Impossible!"

one, of each of such married women,) whether she intended to give up her interest in the estate to be passed? and also the answer given thereto; and where any such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master or) commissioners. (29)

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested shall by deed be described to be situate. (30)

"AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary, or such affidavit may be made where it is found convenient by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf.

"AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same shall, within one month (31) from the making [of] the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or *a* judge.

"AND IT IS HEREBY FURTHER ORDERED, that the fees (32) or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments (*a*) of deeds, and for examining married women, and for the proceedings, matters and things required by the said act to be had, done and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:

	£	*s.*	*d.*
To a judge or master for taking the acknowledgment of every married woman, of which 7*s.* 6*d.* will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a master, the whole will be paid over to the treasury, or the Fee Fund Account of the Court of Chancery	1	6	8

(*a*) See Rules of Trinity Term, 1834.

	£	s.	
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13*s.* 4*d.* for each commissioner	1	6	
To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses	1	1	
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses	2	2	
To the clerk of the peace, or his deputy, for every search	0	1	
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	
To the same, for every further complete number of 50 names, an additional	0	2	
To the officer for every search	0	1	
To the same, for every official copy of the certificate . .	0	2	
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same, for every further complete number of 50 names additional	0	2	0
To the same, for preparing every special commission, including a fee of 5*s.* to the clerk of the chief justice or other judge for the fiat	0	15	0
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3d and 4th Will. 4, c. 74	0	5	6

"AND IT IS HEREBY FURTHER ORDERED, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

For the indorsements on the deed of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together	0	10	0

	£	s.	d.
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands .	0	13	4
For entries of such surrenders, or the memorandums thereof, on the court rolls, at per folio of 72 words . . .	0	0	6

N. C. TINDAL.
J. A. PARK.
. J. B. BOSANQUET.
E. H. ALDERSON."

FORM OF AFFIDAVIT, verifying the certificate of acknowledgment taken in pursuance of the act of parliament, to be made by some practising attorney or solicitor, and to be sworn before a judge of the Court of Common Pleas, or a commissioner appointed for taking affidavits in the said court. (33)

In the Common Pleas.

A. B. of [*Lincoln's Inn*], in the [*county*] of [*Middlesex*], gentleman, one of the attornies [*or* solicitors] of the court of [*King's Bench*], maketh oath and saith, that he knows [*Jane*] the wife of [*John Ball*] in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said [*Jane*], and the certificate signed by the judge or master, or by *A. B.*, of, &c. and *C. D.*, of, &c., the commissioners in the said certificate mentioned, on the day and year therein mentioned, at [*Lambeth*], in the [*county*] of [*Surrey*], in the presence of this deponent, and that at the time of making such acknowledgment the said [*Jane*] was of full age and competent understanding, and that the said [*Jane*] knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made. [And this deponent further saith, that to the best of this deponent's knowledge and belief, neither of the said commissioners is [*or* the said *A. B.*, *or* the said *C. D.*, one of the said commissioners is not] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor or agent, or as clerk to any attorney, solicitor or agent so interested or concerned]. And this deponent further saith, that previous to the said [*Jane*] (the married woman) making the said acknowledgment, he this deponent inquired of the said [*Jane*] (the married woman) or if more than one, of each of them the said [*Jane*] and [*Mary*] (the married women) whether

This is to be omitted when acknowledgment taken by a judge or master.

she intended to give up her interest in the estates in respect of wh such acknowledgment was taken, without having any provision m for her in lieu of or in return for, or in consequence of her so giv up her interest in such estates, and that in answer to such inquiry said [*Jane*] (the married woman) declared that she did intend to g up her interest in the said estates without having any provision ma for her in lieu of or in return for, or in consequence of her so givi up such her interest; of which declaration of the said —— (the ma ried woman) this deponent has no reason to doubt the truth, a verily believes the same to be true, or (34) declared that a provisi was to be made for her in consequence of her giving up such her i terest in the said estates. And this deponent lastly saith, that befo her acknowledgment was so taken, he was satisfied, and does no verily believe that such provision has been made by deed or writing or that the terms thereof have been reduced into writing, and tha such deed or writing has been produced to the said judge, master o commissioners. And lastly this deponent saith, that it appears by th deed acknowledged by the said [*Jane*] (the married woman) that th premises wherein she is stated to be interested are described to be in the parish or place of [*Dale*], (or parishes or places of) [*Lambeth*] and [*Camberwell*], in the county of [*Surrey*] (or counties of [*Kent, Surrey, &c.*] as the case may be.)

Sworn, &c.

N. B. When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

REGULÆ GENERALES.

Trinity Term, 1834.

It is ordered, That from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment taken in pursuance of the late act of Parliament respecting fines and recoveries as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," (35) cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person whom the person before whom the affidavit shall be made shall consider competent so to do.

And it is further ordered, That where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed by the said (*a*) rules to be taken shall be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees; and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

In every case, the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

(*a*) *Sic.*

NOTES

TO THE

RULES OF THE COURT OF COMMON PLEAS,

Concerning to the Acknowledgment of Deeds by Married Women.

Michaelmas Term, 1833.

(1) The spaces inclosed *within* [] are left blank in the Acts and Rules. In other respects the Orders and Forms are given as they appear in the printed Act and Rules.

(2) *Vide suprà*, CHAP. V.

(3) The 84th section prescribes given forms of the memorandum and certificate, " subject to any alterations which may from time to time be directed by the Court of Common Pleas."

(4) See the Form, *infrà*, with the addition directed by this Order.

Remarks on the order requiring Commissioners taking the acknowledgment of a married woman to certify the locality of the lands.

(5) One of the practical advantages anticipated from the substitution of a deed acknowledged for a fine or recovery, was the removal of the necessity, which the technical forms of the abrogated assurances imposed, of ascertaining the localities of the lands. But though it was necessary to specify the vill, or parish, &c. yet in fact the parcels of a fine or recovery (" 100 messuages, 100 acres of land, &c. in the parish of," &c.) were worthless for the purpose of identification, especially as it was the common practice in the country for several parties to join in the same fine in respect of lands held under distinct titles. The parcels were in fact mere matter of form, errors in which were amendable, and so little importance did the legislature attach to them, that the Fine and Recovery Act, s. 7 and 8, has applied a general remedy to mistakes in parcels. The deed leading or declaring the uses of a fine, or making the tenant to the præcipe in a recovery, was the document resorted to for ascertaining the subject, as well as the object of the assurance. The law did not require the localities or other

particulars to be specified in the deed; *there* a general description was sufficient. Nor does the Fine and Recovery Act contain any such requisition. The new Order, therefore, directing the commissioners to certify the localities, seems to aim at a degree of certainty not attained by the common law, nor contemplated by the legislature. The commissioners are to certify that the "premises" comprised in the "indenture," [the act requires a *deed*, but not an *indenture*,] are situate in certain specified parishes or places. Now, all that the commissioners can really certify is, either that they collect from the internal evidence of the deed, (which they must for that purpose *peruse*,) or that they have been informed that the lands intended to be passed are situate in a certain parish or district. The description in the deed may be general or referential, affording no light whatever upon the subject, and the commissioners have no authority to examine the parties or strangers upon oath, or otherwise, concerning "the premises," or indeed to institute any examination besides the separate examination of the feme covert. It is obvious that in framing this part of the Order several points have been overlooked or not duly considered. 1. The difficulty in many cases, and the impossibility in some, of defining the parish or place in which the *premises* are situate. Is the word *place* to be construed by analogy to the rules regarding the parcels of a fine or recovery in which it was requisite to specify the parish or vill, &c.? 2. The fact, that though the perpetual commissioners are appointed *for* a certain district, (s. 81,) their authority is expressly extended by the act (s. 82,) to women resident, and lands situate *without* that district, so that a deed for passing lands at Carlisle may be acknowledged by a woman resident in Ireland before commissioners for Truro, who are nevertheless required by the Order to *certify* the localities, whether the lands be described in the deed or not. 3. The fact that the *premises* may consist of money to be laid out in land, or of other subjects not having any locality. Such cases must be considered as tacitly excepted out of the order. 4. The fact that there will be no mode of placing on record the localities of the parcels in a disentailing deed, unless they appear upon the deed itself. Even a rigid revival of the forms of the abolished assurances, so far as relates to the parcels, would be preferable to the vagueness of this order.

The act intended the affidavit to be merely corroborative of the certificate.

(6) The act (s. 85,) directs the certificate with "an affidavit by some person *verifying the same*, and the signature thereof," to be lodged with some officer of the Court of Common Pleas, and it authorises the Court to make orders and regulations touching the matters to be mentioned in the memorandums and certificates, "and the affidavits *verifying the certificate*;" but it does not appear to authorise the Court to extend the affidavit beyond the verification of the certificate. It

Additions to the affidavit not warranted by the act.

should seem that the affidavit was intended to be a confirmatory not an independent document. This *addition*, therefore, to the affi is, in effect, a graft upon the act itself.

(7) It should seem that the acknowledgments of several ma women of the *same* deed, at least, may be the subject of the same tificate and affidavit; though the Act appears to contemplate a sepa memorandum, certificate and affidavit, in respect of every ackn ledgment. (*a*)

(8) i. e. " of any of the parties in the transaction giving occasio the taking [of] such acknowledgment." These words are a l equivocal. The true construction, however, seems to be, that one least, of the commissioners must not be concerned as attorney, &c the particular transaction to which the deed relates, for any of parties to that transaction. The fact that a commissioner is not attorney, &c. can be positively deposed to only by himself.

(9) This inquiry assumes that every deed executed by a marr woman, operates to deprive her of some interest; but the object of deed may be to destroy an intail and vest the fee in herself, or secure to her the separate enjoyment and dominion, or otherwise benefit her; or it may be, and often is, to convey a dry legal esta The commissioners must, therefore, it should seem, inform themselv in the first place, whether the effect of the deed is the *giving up* of *interest* or not. (Co. Litt. 353, b.)

(10) Quære, " consideration?" The effect of the order is to rend the actual making of the provision a *condition precedent* to the takir of the acknowledgment.

(11) The efficacy of this order as a protection to married women questionable; while the practical inconvenience which must resu from it is manifest. The old law contented itself with ascertainin that the act was freely and advisedly done. (18 Edw. I. stat. 4, 2 Ins 515.) It wisely declined inquiring into private motives and famil transactions. Suppose the feme to stand mute on the subject of provision, or to answer that there was indeed some promise of provision, but that she is content to rest on such promise, and desirou to acknowledge the deed;—the *commissioners* cannot, it seems, safely take the acknowledgment. But is there just ground in law or reason for refusing to take the acknowledgment? Is not this to defeat the

(*a*) But see Rules of Trin. T. 1834.

very object of the solemnity—to prevent the exercise of a free volition? Suppose the deed to be a conveyance to a purchaser, and the source of the promised provision to be the proceeds of the sale;—are the commissioners to delay the acknowledgment till trustees shall be appointed to receive the money, the trusts agreed upon, and a settlement executed? Is the purchaser either to part with his money before he has an effectual conveyance, or to wait the pleasure of the commissioners? The actual making of the provision may depend upon various arrangements, of which the very deed tendered for acknowledgment may be the first step. Then, consider the difficulty of the duty imposed upon the commissioners! Even if the intention to make a provision be evidenced by a written agreement, the construction and effect of that agreement may be extremely doubtful. Are the commissioners to erect themselves into a court of equity for the specific performance of executory contracts? Is the Court of Common Pleas to assume such a jurisdiction?—nay more, to discover, interpret and decree the fulfilment of vague promises? Has it the requisite machinery or the requisite experience? If the agreement be to settle Blackacre, is the commissioner making the affidavit to investigate the title and peruse the settlement? If not, how can he conscientiously depose that he is satisfied that the provision has been made? It may be of the essence of the arrangement between the parties, that the deed shall precede and the provision follow. Has the Court authority to reverse the order? Has it not in fact exceeded its authority, (which extends merely to the *mode* of examination,) in prohibiting the commissioners from taking the acknowledgment until these inquiries be satisfied? The act itself has declared, by a *distinct* section (s. 80), the object of the examination of the married woman, which is to be "touching her knowledge of such deed," and "whether she freely and voluntarily consents to such deed;" nor did the framers of the act ever contemplate any addition to, or alteration in, the substance or matter of the examination, but merely variations in the "mode" or form; much less did they anticipate the erection of a domestic forum composed of local commissioners armed with inquisitorial powers.

The authority of the Court to add to the substance of the examination, questioned.

As the Court cannot exercise any control over Judges and Masters in ordinary in Chancery, "touching the mode of examination," (s. 89,) those superior functionaries are left to conduct the examination in their own way, and thus the law of alienation by married women may be, (and *is*, in point of fact, as the writer has ascertained,) administered in different modes; some holding that as the Court is empowered to alter the *forms* generally, (s. 84,) it may, indirectly at least, control the mode of examination generally; while others contend that when the authority of the Court "touching the mode of examination," is con-

Uniformity of practice.

fined by the act to the commissioners, its authority to alter the fo is necessarily subjected to a corresponding limitation.

Though these rules must soon share the fate common to all l which obstruct the ordinary transactions of mankind, yet they continue to form, with reference to the period of their remaining force, part of the Law of England, unless expunged or corrected the legislature itself; for the Court is clearly incompetent to appl retrospective remedy.

The practical importance of the clauses relating to alienation married women, renders it proper to state and consider them son what in detail. The statute enacts, that "after the 31st Decemb 1833, every married woman (not being tenant in tail), may by *d* dispose of lands and money subject to be invested in land, &c. as fu and effectually as she could do *if she was a feme sole*; save that such disposition shall be valid unless the husband concur in the deed, (nor unless the deed be *acknowledged* by her *as hereinafter is direct* (s. 77);—that the deed "shall, upon her executing the same or *afte wards*, be produced and *acknowledged by her as her act and deed*, befo a judge," &c. (s. 79);—that such judge, &c. shall examine her, apa from her husband, touching her knowledge of such deed [i. e. of *t contents* of such deed, see s. 84], and shall ascertain *whether s freely and voluntarily consents to such deed*, and unless she freely an voluntarily consents to such deed, *shall not permit her to acknowled the same;* and *in such case* such deed shall, so far as relates to the e ecution thereof by such married woman, be *void*" (s. 80): then (aft providing for the appointment, and ascertaining the powers and duti of the commissioners), it proceeds to enact that "when a marrie woman shall acknowledge such deed as aforesaid, the judge, &c. sha sign a memorandum to be indorsed on or written at the foot or in th margin of such deed," (s. 84) of which memorandum a form is given and that "the same judge, &c. shall sign a *certificate of the taking o such acknowledgment*, to be written or engrossed on a separate piec of parchment," (*ib.*) of which a form is also given;—that "ever such certificate as aforesaid of the taking of an acknowledgment by married woman of any such deed as aforesaid, together with an affi davit *verifying the same*, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas" (s. 85), who is to see that the certificate "contains such *statement of particulars* as to the *consent* of the married woman as shall *from time to time be en joined* in that behalf; and IF all the requisites in *this act* in regard to the certificate shall have been complied with, then such officer shall

(a) See *Ex parte Mary Gill*, 1 Bingh. 168, N. S.

cause the said certificate and the affidavit to be filed of record" (*ib.*); —"that WHEN the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, &c. made by any married woman whose acknowledgment shall be *so certified* concerning any lands, &c. *take effect* from the time of being acknowledged, and the subsequent filing of such certificate shall have relation to such acknowledgment" (s. 86);—that the officer shall index the certificates (s. 87);—that a copy of the certificate, signed by the officer, "shall be received as *evidence* of the *acknowledgment* of the deed to which such certificate shall refer" (s. 88); and lastly, that the Court of Common Pleas may make orders "touching the *mode* of examination to be pursued by the *commissioners* to be *appointed under this act*, and touching the particulars to be mentioned in such memorandum and certificate, and the fees, &c. for taking acknowledgments and examining married women, and others matters required by the act for *completing and giving effect* to such acknowledgments and examination" (s. 89).

Considerations suggested by the above provisions, particularly with reference to the materiality of the proceeding as matter of title.

The rules of Michaelmas Term, 1833, render it especially important to weigh well the result of the above enactments, which suggest several points for consideration. 1. We cannot safely reason upon the effect of the deed by analogy to a fine. If the fine was suffered to pass, it became a solemn assurance of record binding *per se* on the married woman at the common law, notwithstanding any omission to comply with the general rules of the court in regard to the examination, affidavit or other particulars. It was immaterial for the purposes of title whether the married woman was in point of fact separately examined or not. (Litt. s. 670, 18 Edw. 1. stat. 4). But the *deed* derives all its efficacy, as a disposition by the married woman, from the superadded ceremonies. The observance of those ceremonies amounts to a dispensation with the disability of coverture. Their observance, however, would impart no operation to an instrument sealed and delivered by a married woman labouring under legal incapacity *other* than coverture. Such an instrument would not be her *deed* for any purpose. If she were not "of full age and competent understanding," the whole proceeding would be nugatory. To suppose that it would be operative is to confound the *deed* with the *fine*. The words of the act are, "*as* fully and effectually as if she was a *feme sole*," (s. 77). On the other hand, if the deed might operate, independently of the act, as where, for example, a married woman disposes of her separate estate, or appoints in execution of a power, the refusal of permission to acknowledge (s. 80), would not prevent the deed from operating to *that* extent. (See s. 78). And it may be observed, that the 80th section, when it declares the deed to be *void*, on refusal by

the commissioners, for want of the wife's free co
to acknowledge it, intends only (what the 77t
expressed), that the deed shall have no extra
acknowledged; but not that the deed shall becon
poses of the 77th section, waste parchment, in
effect from subsequent conformity to the provisio
less, indeed, it can be maintained that the poli
aimed at avoiding the deed on rejection by the ju
periment should be tried before another less s
quisitive functionary—a construction very dange
2. As the deed is in itself nothing, and the extrin
thing, all the prescribed ceremonies are *essentia*
distinguished, or furnished a criterion for disting
essential and unessential; and it should seem tha
added or substituted by the court, under the autho
the same degree of materiality with those originall
act itself. 3. No distinction is drawn or indicat
at least, between observances intended to be mate
posed to be merely formal; but the observances pr
secutive enactments, of which a short abstract has
it is conceived, be taken as parts of one whole; an
that whole be considered as contemplated by the le
it negatives the effect of the disposition by the ma
less the deed be *acknowledged* by her *as hereinafter*
memorandum of acknowledgment is not declared to
does the assurance, at any intermediate stage of th
operative. Its effect, indeed, is expressly conting
the certificate; of which the filing is suspended til
of the act (which requisites must be taken to incl
by the court under the powers of the act) in regard
shall have been complied with; and a copy of th
clared to be evidence of the *acknowledgment*,—not
to be the *only* evidence, but as no other evidence is
almost necessary conclusion that the recorded certif
copy, is the only admissible evidence. Now, unless
the *fact of the taking of the acknowledgment* of the
appear by the certificate, *that* is sufficient for the pu
will be difficult to avoid the conclusion that, upon th
a title derived under the acknowledged deed of a ma
regularity of the certificate, in regard to *every* pa
ascertained. If it be urged that the 86th section, gi
deed by relation, speaks only of "the certificate o
ment," and of married women "whose *acknowledg*

certified," it may be replied, that on reference to the 84th and 85th sections, prescribing the form of certificate, we find that the designation given to the document (inclusive, of course, of *all* its contents), is "a certificate of the taking of an acknowledgment;" and that by the 89th section, all the matters required by the act to be observed are spoken of as so required "for completing and *giving effect to* the acknowledgment." It is true that the anxiety shown to prevent the taking of the acknowledgment until certain conditions be fulfilled, would seem to import that the mere acknowledgment, like the passing of a fine, or the delivery, by a capacitated person, of a deed, would render the disposition operative; but the legislature seeks to *guard* the rights of the married woman by preventing the incipient act—her acknowledgment (or, rather the signing of the memorandum of acknowledgment, for *that* is properly the first step),—by which the assurance would be put into a train for completion without her further privity; and to *bind* her rights only on the final completion of the process by the filing of the certificate. It is clear, at least, that the filing of *a* certificate is essential to give effect to, and supply evidence of the acknowledgment; but is it clear what certificate, if any, short of a certificate in all respects formal, is sufficient to ensure that result? 3. If a strict observance of all the ceremonies be indispensable to give effect to the deed of a married woman, then it is of the utmost moment that they should be as few, as simple, and as definite as possible; otherwise the new assurance may become, like the old, a complication of technical difficulties, and *that*, too, without compensating for the inconvenience of the machinery by the certainty of the result. All tampering with the forms of proceeding is the more strongly to be deprecated, inasmuch as no authority to amend the proceedings is given by the act; though, perhaps, from the exigency of the case, and by analogy to the old and authorized practice of amending fines or recoveries, considered as real actions, the Court of Common Pleas may assume the power of amending.

(12)—or, "the therein named [*Jane*] the wife of the therein named [*John Ball*]."

(13) "An act for abolishing fines and recoveries, and substituting more simple modes of assurance."

Mode of assurance by married women seised of freehold or inheritance.

(14) The act enables a married woman to alien by *deed* acknowledged, as if she were a feme sole. Where her legal freehold or inheritance in possession is to be conveyed, it seems proper, if not necessary, that she should convey it by lease and release, or bargain

and sale inrolled, one of which modes of assurance (or a feoffment) would be requisite if she were actually a feme sole. It is observable that the clause enabling tenants in tail to alien (ss. 15, 40), differs from the clause enabling married women to alien (s. 77).

(15) The words within inverted commas are added by the rule of Michaelmas Term, 1833.

(16) This form and the following form are appended to the rules of Michaelmas Term, 1833. The act does not give any form of affidavit. The affidavits (not being, like affidavits as to fines, made in a suit), must be *stamped*.

Affidavits must be stamped.

(17) The parenthesis which follows is printed as it stands in the printed copies of the rules of Michaelmas Term, 1833. By "the *said* I. K." is meant, it is presumed, the other commissioner not concerned as attorney, &c. where the deponent is himself so concerned. But the commissioner not so concerned should himself swear to the fact. (*Vide suprà*, n. (8)).

(18) These affidavits require either a very strict investigation, or a very lax conscience. They are open to many objections, both as to matter and form; but as they are under consideration, with a view to some modification (if not to their total abrogation) the writer abstains from any further remarks. It is hoped that the new rules (if any) will be well considered, and submitted to the framers of the act, who have not yet been consulted. (*a*)

NOTES *to the Rules of Hilary Term*, 1834.

(19) The statute 3 & 4 Wm. 4, c. 74, abolished fines and recoveries, and professed to substitute *more simple* modes of assurance. As fines and recoveries were real suits in the Court of Common Pleas, that Court had immediate cognizance of those proceedings. But over the stsubituted assurances, which are in nowise analogous to proceedings in a suit, the Court of Common Pleas has no controlling power which it does not derive from the express provisions of the statute. As, indeed, the stat. 3 & 4 Wm. 4, c. 27, s. 36, had pronounced sentence of abolition on the mass of real actions, hardly a remnant was left of those ancient forms which identified the Court of Common Pleas with the law of

No inherent jurisdiction in the Court of Common Pleas over the substituted assurances.

(*a*) It will appear from the notes which follow, that this hope was not realized.

real property. There is nothing in the constitution of that Court which points it out as peculiarly adapted to preside over the *new* law of alienation by married women. The legislature might with propriety have confided, and may still transfer the jurisdiction to the Master of the Rolls, or to the Vice-Chancellor, or to the three Equity Judges; who are necessarily conversant with matters of conveyancing, of which the Court of Common Pleas has few opportunities of acquiring any practical knowledge. In fact, if the statute be chargeable with any incongruity in referring the inrolment of assurances by tenants in tail to the Court of Chancery, and the acknowledgment of the deeds of married women to the Court of Common Pleas, the evil will be best corrected by placing both under the cognizance of an Equity judge. These observations are premised, because it is impossible to read the Rules of Michaelmas Term, 1833, or the above Rules of Hilary Term, 1834, without remarking that they rather savour of past precedent and practice, than breathe the spirit of the new enactments; and that even the letter of the statute has been seen through the medium of the old forms and the old jurisdiction, obscuring and distorting the text.

Suggested transfer of the jurisdiction.

Rules of Michaelmas Term, 1833, and of Hilary Term, 1834, compared.

On comparing the Rules of Michaelmas Term, 1833, with those of Hilary Term, 1834, it will be found not only that many of the objections already urged against the former (*supra*, 419), apply with undiminished force to the latter, but that it is even more difficult to reconcile the latter Rules than the former, with the professed intention of the statute, which aims at facility of transfer and security of title. The principal alterations made by the Rules of Hilary Term, 1834, seem to consist in permitting the *certificate* to retain the form prescribed by the act itself; whereas the Rules of Michaelmas Term, 1833, require the localities of the lands to be inserted in the certificate;—in adding to the rigour of the precautions enjoined by the former Rules on the subject of a *provision*;—in transferring the specification of the parcels to the affidavit, and otherwise varying its form; and in directing the affidavit to be made by some practising attorney or solicitor of one of the Courts at Westminster, or of one of the counties palatine of Lancaster and Durham, and to be sworn before a judge of the Court of *Common Pleas*, or a commissioner appointed for taking affidavits in *that* Court; with liberty, however, where it shall be found convenient, for one of the commissioners himself to make the affidavit.

Increased difficulty of swearing the affidavit.

By expunging the parcels from the certificate, it may be thought that something is gained so far as regards the evidence of title. But the difficulty of swearing the affidavit is increased, for the deponent must in all cases peruse the parcels, at least, of the deed (which parcels may extend to several skins,) if not the whole deed, in order to enable him to make the affidavit with a clear conscience; while the *excessive*

exercution of the limited power given by the act to the Court, is rendered more striking by thus further extending the affidavit beyond the verification of the certificate.

As to the validity of the Rules, and the consequences of their invalidity.

On the whole, it is submitted for consideration whether these Rules, in assuming to extend and vary the subject-matter of the examination; in prohibiting the taking of the acknowledgment until the requisitions in regard to a provision are satisfied, or the sanction of the Court of *Common Pleas* is obtained; and, in loading the affidavit with matters not contained in the certificate, are warranted by law; if not, then, as it seems to be impossible to separate the sound from the unsound parts, whether the Rules must not be treated as nullities, (except so far as they merely regulate the fees, &c.) and acknowledgments be, therefore, taken conformably to the provisions of the *statute*, which would alone constitute the law of the land as to the alienation of real estate by married women; and whether, on a refusal by the commissioners (being officers invested with a *ministerial* and not a *judicial* character,) to take the acknowledgment according to law, the party would not be entitled to the ordinary redress by *mandamus* from the Court of King's Bench.

Contemplated relief from the legislature.

As the new Rules have failed to consult the great object of the statute—that of substituting a more simple and easy method of assurance—legislative interference becomes inevitable, and a bill to remedy the mischief is understood to be already in preparation. The perpetual commissioners, who cannot at present take an acknowledgment beyond the limits of their district, will probably cease to be *local*. It is extremely desirable that means should be devised for putting upon the face of the deed itself *conclusive* evidence of the acknowledgment, either by the seal of the commissioners, (an official seal, which it should be felony to counterfeit,) or by the *allocatur* of the officer of the Court to which the jurisdiction may be given. Titles should, if possible, be relieved from the expense, difficulty and uncertainty attending the investigation of extrinsic facts and proceedings.

If any surprise should be felt at finding names eminent for station and ability appended to rules so exceptionable in principle and so defective in form, let it be remembered that in no department of the law may practical experience be safely despised, and that an attempt on the part of a *mere real property lawyer* to frame rules of *pleading* would probably be attended with a yet more signal failure. The Rule of Easter Term, 8 Geo. 4. (4 Bing. 248, 12 B. Moore, 470,) relating to the acknowledgment of *fines* under the *old* system, (of which rule the rules in question, relating to the acknowledgment of *deeds* under the *new* system, are in part a revival,) was dictated, perhaps, by some solitary case of gross fraud, when the just indignation of the moment

did not permit the framers to consider that fines had become common assurances of the realm; that in many cases the married woman departs with a dry legal estate or worthless right; that in others the chief object is to secure to herself the enjoyment or dominion; and that, after deducting from the remaining cases, those in which the husband is not a tyrant, and the solicitor is not a knave, and those (not a few) in which the lady has sense and spirit, the proportion of cases in which she is left a prey to cunning or compulsion is much too small to demand the interposition of the Court, even if it could interpose with effect, and without sacrificing statutes, titles and conscience to its chivalrous feelings.

Practical working of the Rules of Michaelmas Term, 1833.

(20) These alterations have been made in consequence of a representation by the London Commissioners of the practical difficulties experienced in acting upon the Rules of Michaelmas Term, 1833. How those difficulties will be removed by the new Rules is not very apparent. The affidavit never can be conscientiously sworn. It is believed that the opinion of the learned persons who framed the act has been *taken* on *this* occasion; but the alterations are certainly not in accordance with their views.

(21) The words, "of the several persons," &c. are somewhat too comprehensive; see the act, s. 89.

Proceedings taken before the 1st March, 1834.

(22) The result of this proviso seems to be—1. That the Rules of Michaelmas Term, 1833, and the Rules of Hilary Term, 1834, have concurrent authority from the time of the issuing of the latter Rules till the 1st March, 1834, and that acknowledgments, taken in the interval, according to either set of Rules indifferently, will be good. The object of the proviso must have been to afford time for the promulgation of the new Rules. It cannot be said that Commissioners &c. *apprised* of the new Rules are bound by those Rules exclusively:—if the Commissioners are bound, the parties are bound. 2. That proceedings commenced under the Rules of Michaelmas Term, 1833, but not completed before the 1st March, 1834, may be completed under the same Rules; otherwise, "proceedings taken before the 1st March, 1834," would be "invalidated," contrary to the tenor of the proviso. But no very confident opinion can be pronounced on either point. The following pertinent questions are put to the writer—"With regard to the modification of the revoking clause, has the Court power THUS (i. e. by successive orders) to make *concurrent* two modes of acknowledgment? If *yes*, what is to prevent their making a hundred concurrent modes of acknowledgment, those modes originating in one set of orders?"

(23) The act empowers the Chief Justice to appoint perpetual co missioners, removable at his pleasure; but it is questionable wheth after the appointment of a commissioner, the Court has authority abridge or qualify his competency to execute his office, by imposi the condition of his not being interested, or concerned as attorney, é The commissioners are not the officers of the Court to execute its p cess, but public functionaries to fulfil the purposes of a great legislati change in the general law. The commissioner, once appointed, m take his instructions from the statute, varied by such orders only of t Court of Common Pleas as are *warranted by the statute*. The patr of a living may present; but the clerk, once inducted, is amenable other authorities for the discharge of the duties of his cure. T position of a commissioner, between the conflicting commands of t legislator and the judge, is one of great delicacy, and, perhaps, of sor responsibility, since it is open to contend that an action would l against him for refusing, without legal ground, to take an ackno ledgment.

(24) Let us suppose the married woman to be brought before t commissioners—an old lady of eighty, her memory a little faded, a her articulation far from perfect. By the death of a relation, a lar estate has just devolved to her; she has a numerous progeny,—childre grandchildren, great-grandchildren. As matters stand, the who estate would descend, on her death, to a great-grandson; a resu which her husband and herself are naturally anxious to prevent. T family solicitor is consulted, who, perhaps, calls in the assistance counsel, and a voluminous settlement, extending to twenty skins, prepared, with full knowledge of the state of the family and its affair and after grave and mature consideration. The provisions are ver long and complex, because not only are the objects very numerou but their circumstances are very different, and in some instances ver peculiar. The parcels too are various and extensive, and the state the title renders it necessary or convenient to describe them partl in the recitals, partly in the operative clauses of the deed, an partly by reference to other deeds or instruments, or to the mer fact of descent or devise. The old lady has not been forgotten i the arrangement, but, as women of eighty seldom farm well, it wa deemed expedient that she should be provided for by a handsom annuity, to be issuing partly out of the estate in question, and partl out of an estate belonging to the husband, and by purchasing a house for the residence of herself and her maiden daughters, with a legac bequeathed by the will of their uncle, but not yet received. The firs step is for *both* commissioners to examine the woman, separate an

apart from her husband, touching her knowledge of the deed, and her free consent. This is expressly directed by the act, (a) and must be observed. But it happens that one of the commissioners is the attorney "concerned in the transaction;" he, therefore, and the husband are now turned out of the room, perhaps out of the district;—for the back parlour may be in one commissioner's district, and the front parlour in another, and if the commissioners would take a valid acknowledgment, it behoves them to take it in the parlour of their own district.

House in two districts.

Second examination.

The disinterested commissioner proceeds of course to put the *provision* question; but a provision, with a triple aspect, may well be supposed to puzzle an octogenarian. At length, however, the commissioner,—a man, luckily, of some tact in the management of female clients, and of patience invincible,—imbibes a general notion of the arrangement, and re-admits his brother commissioner and the husband;—for, though the examination relative to a provision is to be conducted by the disinterested commissioner alone, yet *both* commissioners are to be *satisfied* that the provision has been made. The next step is to require the production of the deed or writing making the provision. As to the annuity to be provided out of the estate in question, the commissioners have *only* to peruse the twenty skins before them. So far as that goes, time, skill and attention may get at the fact. But it is represented that the annuity to be provided out of the husband's estate had been actually secured by a previous deed, which unfortunately cannot be produced, for the best of reasons—it was burned, along with all the muniments of that estate, by an accidental fire a few months before. As the commissioners, however, are reasonable men, competent, doubtless, in extreme cases, to receive and investigate secondary evidence, they are *satisfied* (the fact of the fire being notorious in the neighbourhood) by means of the draft of *the* deed or *a* deed, and the attorney's bill for preparing it. Still, the third branch of the provision—the residence—remains to be secured; the terms have not been reduced into writing, and the old lady is well content to rest upon the good understanding which subsists, but the commissioners have no discretion. The disinterested commissioner must now communicate the result of his private examination to the interested commissioner (the attorney in the transaction), and to the husband; but the statements of the attorney, the husband, and even the old lady, differ from the disinterested commissioner's relation and from each other. Indeed, as the disinterested commissioner,—a layman, perhaps,—derives his knowledge from the *viva voce* account of the old lady, while his brother commissioner has the advantage of having

Third and last examination.

Admissibility of secondary evidence.

Conflicting testimony.

(a) S. 80.

been professionally concerned in the transaction, it was extremely improbable that both commissioners would take the same view of the matter. But if the statement of the interested commissioner were allowed to prevail, the old lady's simple tale would vanish in technical subtleties. What is to be done? The patient commissioner, wearied, perplexed, confounded, declares that the terms cannot be reduced into writing, nor, consequently, the acknowledgment be taken; and both commissioners (having consumed the greater part of the day) demand their fees. But a fee for *not* taking an acknowledgment is *casus omissus* in the Rules. Their loss of time and trouble is, however, the least evil. The old lady dies on the following day—the great-grandson, an infant, succeeds to the estate, and the other branches of the family are left without *provision*.

No acknowledgment, no fee.

But suppose the terms of the provision to be reducible, and actually reduced into writing, what is the worth of the document as a binding agreement? Is the husband to sign it? If not signed by the husband, and he is yet to be bound by it, what becomes of individual rights and the statute of frauds? If signed by the husband under *duress* of the rule, would any court of equity execute it? With whom is the agreement to be entered into?—with the wife, or with trustees? Is it to be drawn up on the instant, or are the commissioners to *adjourn* the meeting? The commissioners are required to *verify* this document by their signatures. What peculiar virtue their *extra-official* fiat (for in their official capacity they can verify nothing but the acknowledgment) is to impart we are left to surmise. Then, who is to have the custody of it?—not the commissioners, for their duty terminates with the signing of the certificate, not the attorney, for he is jealously excluded from the examination concerning the provision; not the husband certainly, nor the wife, who is part of himself. As nobody is to be bound by it, or bound to look after it, it serves as an envelope for the disinterested commissioner's fee of 13*s*. 4*d*., and lights his fire the next morning.

An agreement which binds nobody.

The term *provision* is very indefinite. It may comprehend a purse of pin-money, jewels, trinkets, or other matters, which cannot well be the subject of a deed of gift or other formal writing. The provision may flow, not from the bounty of the husband, but *aliunde*: it may have been made by a previous deed, and actually sold, or mortgaged by the husband and wife by a deed duly acknowledged by her; both deeds being in the possession of the purchaser or mortgagee at the other end of the kingdom.

"Provision," —whether it extends to paraphernalia,

—sold or pledged.

Besides, in the case above supposed, the difficulty of complying with the requisition of the rule as to the insertion of the localities of

the parcels in the affidavit, and of procuring a deponent with a conscience of the requisite stamina, might, after all, render the acknowledgment abortive.

Affidavit, by whom to be made.

(25) Has the court authority to confine the verification of the certificate to a select class? The act is general. By a subsequent part of the rule, one of the commissioners is allowed to make the affidavit; but if the acknowledgment be taken before a judge or master, or if neither of the commissioners will swear, then a practising attorney or solicitor, who can and will swear, must be present.

Feme covert; infant or non compos.

(26) Why should not the acknowledgment be taken without proof of full age and sound mind?—*valeat quantum*. The most serious injury and inconvenience may arise from requiring evidence of these facts, while none can arise from dispensing with such evidence, for if either fact be at any time disproved, the *deed* itself will be void. It is not enough that the married woman is of full age and competent understanding at the time of the acknowledgment; she must have been so at the time of the previous act of delivering the deed, unless the acknowledgment would amount to a delivery.

Correction of the text of the new rules.

(27) The order of the text appears, in this place, to have been disturbed. It reads as if the deponent were required to swear, "that the names, &c. *shall be* set forth," &c. The sense or intention of the paragraph may be collected; but where so many facts are required to be positively sworn to, more than ordinary perspicuity and precision seemed to be demanded,

A practising attorney introduced gratis.

(28) This part of the rule supposes the affidavit to be made by an indifferent practising attorney or solicitor, and requires him to depose, that *he* ("the deponent") has made the inquiry which the previous part of the same rule had expressly ordered to be made by the *commissioners*, or one of them! The error is repeated in the form of the affidavit. It should seem, that where the affidavit is *not* made by one of the commissioners, the parties must call in a practising attorney or solicitor, not concerned in the transaction, to hear the provision question put, and the answer given. Though, in such cases, the intrusion of a strange attorney is requisite to "give effect to the acknowledgment and examination," his services are not remembered in the table of fees.—The certificate and affidavit should always be made at the instant, lest any accident should befall the commissioners or the attorney.

(29) Is it possible for any other person than the attorney of t parties in the transaction to make the deposition here required?— for the attorney himself to swear, without mental reservation, th the provision has been made, (i. e. *effectually* made) or that tl terms of the intended provision have been reduced (i. e. *correct* reduced) into writing?

(30) In point of construction, this passage must, it is presumed, b confined to *the* "premises," and *the* "deed" immediately in questio though its literal terms are more comprehensive.—Some of the Maste refuse to have any thing to do with the *parcels*, or with the *provisio* question, and they are right. What is to to be done?—the Maste will not yield; the officer of the Common Pleas has no discretion, an even the court itself is apparently powerless. The court requires, i effect, that the parcels shall be set out in the deed. Consider the con sequence! A. devises "all his real estates" to B. a married woman and dies; B. (who is similarly circumstanced, as to family, with th old lady in note (24), *suprà*,) is anxious to make an immediate settle ment; but the localities of the estates must first be ascertained, and while this inquiry is going on, B. dies.

(31) i. e. a *lunar* month. The *act* adopts *calendar* months.

(32) This table of fees would probably require amendment:—But as the legislature is about to take the subject into consideration, a more detailed notice of the rules my be spared. It is manifest that the law (if these orders be law) cannot, without endangering the rights of property, be permitted to remain in its present state. (*a*)

(33) By what authority is the taking of the affidavit confined to the judge or commissioner of the Common Pleas? And why is the affidavit intitled, "In the Common Pleas?"

(34) The form of affidavit is here given as it appears in the official document; but the passage, beginning at "or" and ending at "commissioners," should, in order to be clearly understood, have been printed, as a variation, thus: [*or*, declared that, &c., in the said estates; and this deponent lastly saith, &c.]

(*a*) The legislature has not yet interposed, but the subject is under consideration.

Trinity Term, 1834.

Wife an infant trustee.

(35) See *Re Sarah Luke*, an infant, wife of *G. Luke*, 1 Bingh. 265, N. S., where the form of acknowledgment was varied on account of the infancy of the wife, who, as trustee of a legal estate, had been ordered by the Duchy Court of Lancaster, before her marriage, to convey to other trustees, pursuant to 11 Geo. 4, c. 60, s. 6. This case seems to furnish another argument against the propriety of the introduction into the Act and Rules of the ingredient of full age (*suprà*, n. (26).) The Rules are drawn up with as little attention to the fact, that the conveyance by a married woman is often confined to the passing of a dry legal estate, as to other considerations, which a due regard for the intention of the legislature, the authority of the court, the opinion of the profession, and the convenience of transactions, would have suggested. They concern a very important branch of the law of alienation, yet they seem to be at once so erroneous in principle, and so inaccurate in language, as to lead almost to the supposition that their preparation was confided to some inferior officer of the court, possessing no other qualification for the task than attachment to the forms of the old law.

QUESTIONS

RELATIVE TO THE

EXTENSION OF LEGAL REMEDIES TO EQUITABLE OWNERS.

[Referred to, *suprà*, 181.]

These Questions were prepared by the Real Property Commissioners, some time after the Plan for a General Regist had been matured.

1. Do you think that a person having a beneficial estate might l allowed to sue at law against a wrong doer, or an adverse claiman without using the name of the trustee of the mere legal estate?

2. Would there be any danger or inconvenience in giving a Cou of law jurisdiction to determine that the legal estate is, or has b come, a mere naked or passive trust, which ought not to interfe with the remedies of the beneficial owner?

3. As beneficial estates are enjoyed and transmitted to heirs c representatives, with some few exceptions, according to the rules c law, is there any sufficient reason for protecting the enjoyment, an determining questions as to the transmission of them, only by mean of courts of equity?

4. If the technical rules which require certain artificial forms c conveyance of legal estates (as lease and release) and which preven any transfer of some legal interests (as contingent estates) were take away, and equitable estates were thus still more assimilated to lega estates, would not the reason for confining the jurisdiction to the Cour of Chancery be diminished?

5. And ought not the technical rules to be taken away?

6. In case of a trust being a mere naked or passive trust, either b its creation, or from its purposes having ceased, do you think that th beneficial owner might be allowed to recover possession in a court o law from a trustee holding adversely to him?

7. Or does the possibility that the trustee may have some claim for disbursements constitute a sufficient objection to this proceeding?

8. Might not the act of parliament be so worded as to exclude the

jurisdiction at law from cases of executory trusts, or trusts by implication or construction, or to arise by the decree or declaration of a court of equity, so as to give the jurisdiction only in cases of direct trusts created by deed or will?

9. If purchasers by registering their deeds were enabled to acquire priority over prior unregistered rights, do you not think that the rule which enables a purchaser for valuable consideration without notice to defeat a prior equitable right by getting in an outstanding legal estate might be taken away?

10. Is that rule agreeable to substantial justice?

11. Supposing that mere legal estates were no longer serviceable as protections against secret estates, and that they could not be set up at law against the beneficial owner, would not the inconveniences attending outstanding legal estates be at an end, and might not outstanding legal estates be neglected by purchasers? (*a*)

12. Would not this greatly facilitate the making out of titles and the completion of conveyances?

13. When trusts are created for purposes which may not require them to be called into action for a certain period, and which do not interfere with the intermediate enjoyment or transmission of the property affected with the trust, such as, trusts for raising portions, securing annual payments, &c. which may be called dormant trusts, do you not think that the persons to whom the property belongs beneficially subject to such dormant trusts, may be allowed to sue at law against wrong doers, and adverse claimants, in their own names?

14. If the trust is not to be called into action until a future period certain, as, trusts for raising portions for younger children after the decease of parents, may not such dormant trusts be put, in the mean time, on the footing of a mere passive trust, so as not to interfere with legal actions?

15. If the trust, though immediate, does not require to be called into action, as a trust for securing an annual payment which the owner of the property keeps down, might not the beneficial owner be allowed to sue at law against wrong doers, and adverse claimants, with the consent of the trustee, and might not the consent of the trustee afford sufficient evidence in the court of law that the trust did not require to be called into action against the plaintiff: And might not a mortgagee, not in possession, be considered to be a trustee of the same description?

(*a*) See the Tract referred to in the Preface to this work, where the tendency of a Registry, carrying *notice*, to render the *legal* estate worthless, had been pointed out.

16. And would not such provision afford facilities for trying ri in some cases in which courts of equity will not either deter them or send them to law, without taking previous accounts, going through enquiries unconnected with the right to be tried, would not this be a very beneficial effect?

17. How ought such consent to be evidenced?

18. Ought such consent to be averred in the pleadings, or wo it not be sufficient to prove it at the trial?

19. Might the consent be withdrawn before trial?

20. If such consent were capriciously and unjustly refused, mi not a court of equity have discretion to condemn the trustee, wh refusal would make an equity suit necessary, in the costs of the s or at least to refuse him his costs of such suit?

21. Might not the proposed legal jurisdiction be given so as t to take away the jurisdiction of equity in the same cases?

22. But if a court of equity were resorted to unnecessarily, a especially if it were resorted to by way of appeal from the decision law, might not the court of equity have a discretionary power condemn the party in costs?

23. Would not such enactments tend to confine the jurisdiction courts of equity in matters of trust to the enforcement of trusts, a the administration of active trusts, and the relieving against breach of trust?

24. Would not such effect be beneficial?

The following Questions seem to be Supplemental.

When the legal estate in possession is outstanding in a truste who has no interest or duty, for a term or other partial interes might the person claiming the legal estate in remainder and the ben beneficial interest in possession, be allowed to sue at law against a wron doer or adverse claimant, in the same manner as if an injunction ha been granted by a court of equity against setting up the legal estate?

Might a person claiming a beneficial interest, but having no leg estate, be allowed to sue at law against a wrong doer, or perso claiming adversely to the title of the trustees in whom the same leg estate may be vested, without using the name of such trustee?

Might a person claiming a beneficial interest be allowed to sue a law against a person claiming adversely an equitable interest, subjec to the same legal estate?

THE

STATUTES

OF

WILLIAM IV.

CONCERNING

PRESCRIPTION.
TITHES.
LIMITATION OF ACTIONS.
FINES AND RECOVERIES (ENGLAND).
DOWER.
INHERITANCE.
SIMPLE CONT
APPORTIONM
ESCHEAT.
EXCHANGES
FINES AND R
LAND).

STATUTES.

PRESCRIPTION.

2 & 3 WILL. IV. CAP. 71.

[*Royal Assent*, 1st August, 1832.]

An Act for shortening the Time of Prescription in certain Cases.

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claims to right of common and other profits à prendre, not to be defeated after thirty years enjoyment by showing the commencement:

after sixty years enjoyment the right to be absolute, unless had by consent or agreement.

2. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any

In claims of right of way or other easement, the periods to be twenty years and forty years.

time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

3. And be it further enacted, That when the access and use of light to and for any dwelling-house, workshop or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

4. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

In actions on the case the claimant may allege his right generally, as at present.

5. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied to specially.

that in all pleadings to actions of trespass, and all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

Restricting the presumption to be allowed in support of claims herein provided for.

6. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned

in this act as may be applicable to the case and to the nature of the claim.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible. Proviso for infants, &c.

8. Provided always, and be it further enacted, That when any land or water upon, over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof. What time to be excluded in computing the term of forty years appointed by this act.

9. And be it further enacted, That this act shall not extent to Scotland or Ireland. Not to extend to Scotland or Ireland.

10. And be it further enacted, That this act shall commence and take effect on the first day of Michaelmas term now next ensuing. Commencement of act.

11. And be it further enacted, That this act may be amended, altered or repealed during this present session of parliament. Act may be amended.

MODUS DECIMANDI.

2 & 3 WILL. IV. CAP. 100.

[*Royal Assent*, 9th August, 1832.]

An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes.

WHEREAS the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or What prescriptions and claims of modus decimandi to be valid in law.

otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the king, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a modus decimandi the payment or render of such modus, and in cases of claim to exemption or discharge showing the enjoyment of the land, without payment or render of tithes, money or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality or quantity from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of modus made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice, in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of modus made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

Proviso.

What compositions for tithes shall be considered valid.

2. And be it further enacted, That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron and incumbent were parties, and which hath not since been set aside, abandoned or departed from, shall be and the same is hereby confirmed and made valid in law; and that no modus, exemption or discharge

shall be deemed to be within the provisions of this act, unless such modus, exemption or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act.

The act not available in any suit now commenced, &c.

3. Provided always, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof.

To what cases this act shall not extend.

4. Provided also, and be it further enacted, That this act shall not extend or be applicable to any case where the tithes of any lands, tenements or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender or other determination of such demise or composition.

Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation under this act;

5. Provided also, and be it further enacted, That where any lands or tenements shall have been or shall be held or occupied by any rector, vicar or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar or other person, or by any person compounding for tithes with any such rector, vicar or other person, or by any tenant of any such rector, vicar or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned.

as also the time during which any person capable of resisting any claim shall be an infant, &c.

6. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What it shall be sufficient to allege in actions commenced under this act.

7. And be it further enacted, That in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the modus or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and en-

joyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

No presumption allowed in support of any claim for any less period than mentioned in this act.

8. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Act to extend to England only.

9. Provided also, and be it further enacted, That this act shall not extend to Scotland or Ireland.

LIMITATION OF ACTIONS AND SUITS.

3 & 4 WILL. IV. CAP. 27.

[*Royal Assent*, 24th July, 1833.]

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.

DEFINITIONS.

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or

Meaning of the words in the act;

"Land."

"Rent."

Person through whom another claims.

some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Person."

Number and gender.

TIME OF LIMITATION FIXED FOR LAND AND RENT.

Twenty Years.

2. And be it further enacted, That after the thirty-first day of December one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims.

WHEN RIGHT SHALL BE DEEMED TO HAVE FIRST ACCRUED.

3. And be it further enacted, That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent, shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent, shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have

When the right shall be deemed to have accrued:

in the case of an estate in possession;

on dispossession;

on abatement or death;

on alienation;

in case of future estates;

obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.

In case of forfeiture or breach of condition.

Forfeiture.

Where advantage of forfeiture is not taken by remainder-man, he shall have a new right when his estate comes into possession.

4. Provided always, That when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Reversioner.

Reversioner to have a new right.

5. Provided also, That a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Administrator.

An administrator to claim as if he obtained the estate without interval after death of deceased.

6. And be it further enacted, That for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

Tenancy at Will.

Right of party entitled subject to a tenancy at will shall be deemed to have accrued at the determination of the tenancy, or at the end of one year.

7. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Tenancy from Year to Year.

8. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen.)

Right of party entitled, subject to a tenancy from year to year, shall be deemed to have accrued at the end of the first year or last payment of rent.

Lease in Writing Reserving Rent.

9. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Where rent amounting to 20s. reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

ENTRY.

10. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

A mere entry not to be deemed possession.

CONTINUAL CLAIM.

11. And be it further enacted, That no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action.

No right to be preserved by continual claim.

COPARCENERS, &c.

12. And be it further enacted, That when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

Possession of one coparcener, &c. not to be deemed the possession of the others.

WRONGFUL POSSESSION OF YOUNGER BROTHER, &c.

Possession of a younger brother not to be the possession of the heir.

13. And be it further enacted, That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

WRITTEN ACKNOWLEDGMENT OF TITLE.

Acknowledgment in writing given to the person entitled, or his agent, equivalent to possession or receipt of rent.

14. Provided always, and be it further enacted, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

TIME OF LIMITATION ENLARGED.

Possession not adverse at passing of Act.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, That when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry, or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act.

Disabilities.

In cases of infancy, lunacy, coverture, or being beyond seas, ten years to be allowed from the termination of the disability or death.

16. Provided always, and be it further enacted, That if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued, as aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened).

EXTREME PERIOD OF LIMITATION FIXED.

Forty Years.

17. Provided nevertheless, and be it further enacted, That no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry, or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

But no action, &c. shall be brought beyond forty years after the right of action accrued.

Successive Disabilities.

18. Provided always, and be it further enacted, That when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

No further time to be allowed for a succession of disabilities.

"Beyond the Seas."

19. And be it further enacted, That no part of the United Kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, or *Sark*, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

CONCURRENT RIGHTS.

20. And be it further enacted, That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

limited or taken effect after or in defeasance of such estate or interest in possession.

ESTATES TAIL.

Where time has run against tenant in tail.

Where tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

21. And be it further enacted, That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred.

Where time has commenced running against tenant in tail.

Possession adverse to a tenant in tail shall run on against the remaindermen whom he might have barred.

22. And be it further enacted, That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession under defective conveyance by tenant in tail.

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after that period at which the assurance, if then executed, would have barred them.

23. And be it further enacted, That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years, such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

SUITS IN EQUITY.

Time of Limitation fixed—with reference to the legal Limitation.

No suit in equity to be brought af-

24. And be it further enacted, That after the said thirty-first day

December one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

ter the period when the plaintiff, if entitled at law, might have brought an action.

Express Trust.

25. Provided always, and be it further enacted, That when any land or rent shall be vested in a trustee upon any express trust, the right of the cestuique trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser for value.

Fraud.

26. And be it further enacted, That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

In cases of fraud no time shall run whilst the fraud remains concealed.

Proviso for *bonâ fide* purchasers for value.

Acquiescence.

27. Provided always, and be it further enacted, That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity, in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

MORTGAGOR AND MORTGAGEE.

Time of Limitation fixed—twenty years.

28. And be it further enacted, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession or from the last written acknowledgment.

redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

SPIRITUAL AND ELEEMOSYNARY CORPORATIONS SOLE.

Time of Limitation fixed.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or within sixty years.

29. Provided always, and be it further enacted, That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the time of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said

thirty-first day of December one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

ADVOWSONS.

Time of Limitation fixed.

No advowson to be recovered but within three incumbencies or sixty years.

30. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

Lapse.

Incumbencies after lapse, to be reckoned within the period, but not incumbencies after promotions to bishoprics.

31. Provided always, and be it further enacted, That when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

Estates subsequent to Estates Tail.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

32. And be it further enacted, That in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

Extreme Period of Limitation—One Hundred Years.

No advowson to be recovered after 100 years.

33. Provided always, and be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person,

or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title.

FINAL EXTINCTION OF RIGHT.

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. And be it further enacted, That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.

RECEIPT OF RENT.

Receipt of rent to be deemed receipt of profits.

35. And be it further enacted, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

REAL AND MIXED ACTIONS ABOLISHED.

Real and mixed actions abolished after the 31st December, 1834;

36. And be it further enacted, That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

except dower, quare impedit, and ejectment.

Saving Clauses.

37. Provided always, and be it further enacted, that when on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

Proviso for bringing real actions until the 1st June, 1835, in certain cases.

38. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

DESCENT CAST, DISCONTINUANCE AND WARRANTY.

39. And be it further enacted, That no descent cast, discontinuance or warranty which may happen or be made after the said thirty-first day of December one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

No descent, warranty, &c. to bar a right of entry.

CHARGES AND LEGACIES.

Time of Limitation fixed—Twenty Years.

40. And be it further enacted, That after the said thirty-first day of December one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Money charged upon land and legacies, to be deemed satisfied at the end of twenty years if no interest paid nor acknowledgment in writing in the meantime.

ARREARS OF DOWER.

Time of Limitation fixed—Six Years.

41. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of

No arrears of dower to be recovered for more than six years.

dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

ARREARS OF RENT OR INTEREST.

Time of Limitation fixed—Six Years.

No arrears of rent or interest to be recovered for more than six years.

42. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

SPIRITUAL COURTS.

Act to extend to the spiritual courts.

43. And be it further enacted, That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

SCOTLAND AND IRELAND.

Act not to extend to Scotland, nor to advowsons in Ireland.

* *Sic.*

44. Provided always, and be it further enacted, That this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland.

Act may be amended.

45. And be it further enacted, that this act may be amended, altered or repealed during this present session of parliament.

FINES AND RECOVERIES.

3 & 4 WILL. IV. CAP. 74.

[*Royal Assent*, 28th August, 1833.]

An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.

DEFINITIONS.

Meaning of certain words and expressions.

BE it enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in the construction of this act, the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or

"Lands."

"Estate."

"Base fee."

"Estate tail."

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement; and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: Provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is any thing in the subject or context repugnant to such construction.

"Person." Number and gender.

"Settlement."

FINES AND RECOVERIES.

Abolition Clause.

No fine or recovery to be levied or suffered after the 31st of Dec. 1833.

2. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery which shall be levied or suffered contrary to this provision, shall be absolutely void.

Covenants and Agreements—Special Substitution Clause.

Persons liable after 31st of Dec. 1833, to levy fines or suffer recoveries under covenants may effect the purposes intended by means of this act; but where the purpose of a fine or recovery cannot be so effected the persons liable to levy fines or suffer recoveries shall execute a deed which shall have

3. And be it further enacted, That in case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or

agreement to make or to procure to be made such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute or to procure to be executed some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

the same operation as the fine or recovery.

FINES AND RECOVERIES—(continued.)

REMEDIAL CLAUSES.

Ancient Demesne — Reversal of Fines, &c.

4. And be it further enacted, That no fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor, and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the conusors thereof,

Fines and recoveries of lands in ancient demesne when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties

thereto, and persons claiming under them, as if not reversed as to the lord.

and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

FINES AND RECOVERIES—(continued.)

Defect of Jurisdiction.

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed.

5. And be it further enacted, That if at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid, and binding, as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery: and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

FINES AND RECOVERIES — (continued.)

Ancient Demesne—Tenure restored.

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within twenty years.

6. And be it further enacted, That in every case in which at any time, either before or after the passing of this act, the tenure of ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognised as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

Errors in Fines.

Fines made valid without amendment.

7. And be it further enacted, That if it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Errors in Recoveries.

Recoveries made valid without amendment.

8. And be it further enacted, That if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

FINES AND RECOVERIES—(continued.)

Jurisdiction to amend, saved.

Saving jurisdiction in cases not provided for.

9. Provided always, and be it further enacted, That nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Defect of Tenant to Præcipe—Non-inrolment of Bargain and Sale.

Recoveries made valid in certain cases where bargain and sale is not duly inrolled.

10. And be it further enacted, That no common recovery already suffered or, hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

Defect of Legal *Tenant to Præcipe.*

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

11. And be it further enacted, That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

Remedial Clauses qualified.

Certain cases in which fines and recoveries shall not be made valid by this act.

12. Provided always, and be it further enacted, That where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery if valid shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings

at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

FINES AND RECOVERIES—(continued.)

Records and Proceedings.

As to the records of fines and recoveries in the courts of Common Pleas at Westminster and Lancaster, and the court of Pleas at Durham, after the 31st of Dec. 1833.

13. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed: and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made and extracts or copies obtained at such times and on paying such fees as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed.

WARRANTIES.

Estates tail, and estates expectant thereon, no longer barrable by warranty.

14. And be it further enacted, That all warranties of lands which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail

thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

TENANTS IN TAIL.

General enabling Clause.

Power, after the 31st of Dec. 1833, to dispose of lands entailed in fee simple or for a less estate, saving the rights of certain persons.

15. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the king's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

Ex provisione viri, &c.—Restraining Clause.

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 H. 7, c. 20, except with assent.

16. Provided always, and be it further enacted, That where, under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled, "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands.

Repeal of 11 *Hen.* 7, *c.* 20.

Except as to lands in settlements before this act, the act 11 H. 7, c. 20, repealed.

17. Provided always, and be it further enacted, That, except as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh shall be and the same is hereby repealed.

Reversion in Crown.—Restraining Clause.

The power of disposition not to extend to certain tenants in tail.

18. Provided always, and be it further enacted, That the power of disposition hereinbefore contained shall not extend to tenants of estates tail who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embar feigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.

TENANTS IN TAIL—(continued.)

Base Fees.—Enabling Clause.

Power after the 31st of Dec. 1833, to enlarge base fees; saving the rights of certain persons.

19. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the king's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

Heirs expectant.—Restraining Clause.

Issue inheritable not enabled to bar expectancies.

20. Provided always, and be it further enacted, That nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein.

Dispositions for a limited purpose.

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

21. Provided always, and be it further enacted, That if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate pour autre vie, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

Protectorship—instituted.

The owner of the first existing estate under a settlement prior to the estate tail under the same settlement, to be the protector of the settlement.

22. And be it further enacted, That if at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate

tail, then the person who shall be the owner of the prior estate, or the first of such prior estates if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate,) shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause: and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

TENANTS IN TAIL—(continued.)

Protectorship—Undivided Shares.

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, and be it further enacted, That where two or more persons shall be owners, under a settlement within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share.

Protectorship—Married Women.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

24. Provided always, and be it further enacted, That where a married woman would if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

Protectorship—Estates restored or confirmed.

As to estates confirmed or restored by settlement.

25. Provided always, and be it further enacted, That, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as

regards the protector of the settlement, be deemed an estate subsisting under such settlement.

TENANTS IN TAIL—(continued.)

Protectorship—Lessees under Settlements excluded.

As to leases at rent created by settlement.

26. Provided always, and be it further enacted, That where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

Protectorship—Dowresses, &c. excluded.

No tenant in dower, heir, executor, &c. to be protector, except in the case of a bare trustee.

27. Provided always, and be it further enacted, That no woman in respect of her dower, and (except in the case hereinafter provided for or of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three,) no bare trustee, heir, executor, administrator or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

Protectorship—In Cases of Exclusion.

Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

28. Provided always, and be it further enacted, That where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who if such estate did not exist would be the protector of the settlement shall be such protector.

Protectorship—Tenant to Præcipe.

Where, in the disposition of an estate before the 31st Dec. 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

29. Provided always, and be it further enacted, That where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Protectorship—Tenant to Præcipe.

Where, in the case of the disposition of a reversion on or before the 31st of Dec. 1833, the person to make

30. Provided always, and be it further enacted, That where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or other-

the tenant to the writ of entry in a recovery shall be the protector.

wise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

TENANTS IN TAIL—(continued.)

Protectorship—Bare Trustee.

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

31. Provided always, and be it further enacted, That where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Protectorship—Power to appoint Protector.

Power to any settlor to appoint the protector.

32. Provided always, and be it further enacted, That it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate during the whole or any part of such period the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who

but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

TENANTS IN TAIL—(continued.)

Protectorship—Lunatic, &c.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c. the Court of Chancery to be the protector.

33. Provided always, and be it further enacted, That if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being, or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot or of unsound mind as aforesaid; or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid; or if any settlor entailing lands shall in the settlement by which the lands shall be entailed declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

Tenant in tail and Protector—Restraining Clause.

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

34. Provided always, and be it further enacted, That if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such

actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

TENANTS IN TAIL—(continued.)

Owner of Base Fee and Protector—Restraining Clause.

Where a base fee, and a protector, his consent requisite to the exercising of a power of disposition.

35. Provided always, and be it further enacted, That where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Protector—his Irresponsibility, &c.

The protector to be subject to no control in the exercise of his power of consenting.

36. And be it further enacted, That any device, shift or contrivance by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

Protectorship—Exclusion of Equity.

Certain rules of equity not to apply between protector and a tenant in tail under the same.

37. Provided always, and be it further enacted, That the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

Confirmation of voidable Estates.

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not

38. Provided always, and be it further enacted, That when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition,

whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estates so far as such tenant in tail would then be capable under this act of confirming the same without such consent: provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

against a purchaser without notice.

TENANTS IN TAIL—(continued.)

Base Fees—Enlargement of.

39. And be it further enacted, That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of passing this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reverversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

Base fees, when united with the immediate reversions, enlarged instead of being merged.

Mode of Assurance—General substitution Clause.

40. And be it further enacted, That every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed.

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

TENANTS IN TAIL—(continued.)

Inrolment of Assurance.

Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five-sixths of a rack rent, to be inoperative unless inrolled in Chancery within six months.

41. Provided always, and be it further enacted, That no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent), shall have any operation under this act, unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth.

Protectorship—Mode of Consent.

Consent of the protector to be given by the same assurance or by a distinct deed.

42. And be it further enacted, That the consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Protectorship—Consent by distinct Deed.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

43. And be it further enacted, That if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

Protectorship—Consent irrevocable.

Protector not to revoke his consent.

44. And be it further enacted, That it shall not be lawful for the protector of a settlement, who, under this act, shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Protectorship—Consent of Married Women.

A married woman protector to consent as a feme sole.

45. And be it further enacted, That any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

TENANTS IN TAIL—(continued.)

Protectorship—Inrolment of distinct Deed.

Consent of a protector by distinct deed, void unless inrolled with or before the assurance.

46. Provided always, and be it further enacted, That the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery, either at or before the time when the assurance shall be inrolled.

Jurisdiction of Equity—Exclusion of.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

47. And be it further enacted, That in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under this act in a court of law.

Protectorship—Consent of Lunatic, &c.

Lord Chancellor, &c. to have the power to consent to disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

48. Provided always, and be it further enacted, That in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor,

Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) to make such orders in the matter as shall be thought necessary; and if such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

Order of the Lord Chancellor, &c. to be evidence of consent.

49. Provided always, and be it further enacted, That in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

TENANTS IN TAIL—(continued.)

Copyholds—Qualified Application of previous Clauses.

The previous clauses to apply to copyholds, with certain variations.

50. And be it further enacted, That all the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained.

Copyholds—Consent of Protector by Deed.

As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail.

51. Provided always, and be it further enacted, That if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed, the lord, or steward or deputy steward, shall, by writing under his hand, to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor;

and the indorsement, purporting to be so signed, shall of itself be *primâ facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered, the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum, signed by him, testifying the entry of the same on the court rolls.

TENANTS IN TAIL—(continued.)

Copyholds—Consent of Protector not *by Deed.*

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

52. Provided always, and be it further enacted, That if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made: and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof.

Copyholds—Equitable Entails.

Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

53. Provided always, and be it further enacted, That a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when

required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: Provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered.

TENANTS IN TAIL—(continued.)

Copyholds—Inrolment dispensed with.

Inrolment not necessary as to copyholds.

54. Provided always, and be it further enacted, That in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls.

Bankrupts—Partial Repeal of 6 Geo. 4, c. 16.

Repeal of the Bankrupt Act, 6 G. 4, c. 16, s. 65, so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st of Dec. 1833, nor to revive former acts.

55. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, so much of an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "*An Act to amend the Laws relating to Bankrupts*," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, shall be and the same is hereby repealed: Provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat which, in pursuance of the said act of the sixth year of the reign of King George the Fourth, or of any former act concerning bankrupts, or of an act passed in the first and second years of the reign of his Majesty King William the Fourth, intituled "*An Act to establish a Court of Bankruptcy*," hath been or shall be issued on or before the 31st day of December, one thousand eight hundred and thirty-three: Provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them.

Bankrupt—Actual Tenant in Tail.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of Dec. 1833,

56. And be it further enacted, That any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act, passed in the first and second years of the reign of King William the Fourth, under which any person shall be adjudged

a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

by deed to dispose of the lands of the bankrupt to a purchaser.

Proviso as to consent of protector, if any.

TENANTS IN TAIL—(continued.)

Bankrupt—Base Fee.

57. And be it further enacted, That any commissioner acting in the execution of any such fiat as aforesaid under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Commissioner, in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

Bankrupt—Consent of Protector.

58. And be it further enacted, That the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such

As to the consent of the protector in case of bankruptcy.

protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act, with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

TENANTS IN TAIL—(continued.)

Bankrupt—Inrolment &c. of Deeds of Disposition and Consent.

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands; and of the deed of consent.

59. And be it further enacted, That every deed by which any commissioner acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of lands, not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

Bankrupt—Enlargement of Base Fees.

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. And be it further enacted, That if any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such

settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

TENANTS IN TAIL—(continued.)

Bankrupt—Same.

Enlargement of base fees subsequently to the sale or conveyance of the same under the bankrupt acts.

61. And be it further enacted, That if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Bankrupt—Confirmation of voidable Estates.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent on there ceasing to be a protector; but not against a purchaser, without notice.

62. Provided always, and be it further enacted, That where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the dispositioon by such commissioner, and such actual tenant in tail, if he had not been ad-

judged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: Provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

TENANTS IN TAIL—(continued.)

Bankrupt — Certain Acts Avoided.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

63. And be it further enacted, That all acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Bankrupt—Subordinate power of disposition.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

64. Provided always, and be it further enacted, That, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate, and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

Bankrupt—Death in certain cases unimportant.

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

65. And be it further enacted, That any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same

would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say), in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

TENANTS IN TAIL—(continued.)

Bankrupt—Legal Tenant in Tail of Copyholds.

Every disposition by the commissioner of copyhold lands where the estate shall not be equitable to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

66. And be it further enacted, That every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs, and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

Bankrupt—Mediately accruing Rents; Covenants and Conditions.

Assignees to recover rents of the lands of a bankrupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion. This

67. And be it further enacted, That the rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act, shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of

clause to apply to all copyhold lands; but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute made in the eleventh year of the reign of his majesty King George the Second, intituled "An Act for the more effectual securing the Payment of Rents and preventing Frauds by Tenants," or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions, and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition, and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements as the bankrupt would have had in case he had not been adjudged a bankrupt: Provided always, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

11 Geo. 2, c. 19.

TENANTS IN TAIL—(continued.)

Bankrupt's Lands in Ireland.

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

68. And be it further enacted, That all the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the king's most excellent majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland.

Bankrupt's Lands in Ireland—Inrolment.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the court of chancery there.

69. Provided always, and be it further enacted, That in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settle-

ment of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland, within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England.

ENTAILED MONEY.

(*Sect.* 70, 71, 72.)

Repeal of 7 *Geo.* 4, *c.* 45.

Repeal of the statute 7 G. 4, c. 45, except as to proceedings commenced before 1st Jan. 1834.

70. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled, "An Act for repealing an Act passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled, 'An Act for the Relief of Persons entitled to entailed Estates to be purchased with Trust Monies,' and for making further provision in lieu thereof," shall be, and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed: Provided always, that the act repealed by the said act of the seventh year of the reign of his late Majesty King George the Fourth shall not be revived.

39 & 40 G. 3, c. 56, not to be revived.

Entailed Money—Mode of Disposition.

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

71. And be it further enacted, That lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to: and all the previous clauses in this act, so far as circumstances will admit, shall in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall, in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years

absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll.

Entailed Money of Bankrupts—Ireland.

Lands of any tenure in Ireland, to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

72. And be it further enacted, That so far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly herein-before contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subjest to be invested in the purchase of lands to be settled so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland; provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England, within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

TENANTS IN TAIL—(continued.)

Inrolment of Deeds—Acknowledgment.

As to deeds being acknowledged before inrolment.

73. And be it further enacted, That any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by this act requiring to be inrolled in his Majesty's High Court of Chancery in England or Ireland.

Inrolment of Deeds—Relation back.

Every deed to be inrolled by which lands or money

74. And be it further enacted, That every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ire-

land, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

shall be disposed of under this act to take effect as if inrolment not required.

TENANTS IN TAIL—(continued.)

Inrolment of Deeds—Fees.

75. And be it further enacted, That it shall be lawful for his Majesty's High Court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's High Court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the inrolment of such deeds, and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolments of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

Entries of Deeds on Court Rolls, &c.—Copyholds—Fees.

76. And be it further enacted, That it shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls.

The Court of Common Pleas to regulate the fees for entries on court rolls and indorsements on deeds, and for taking consents, &c.

MARRIED WOMEN.

General enabling Clause.

77. And be it further enacted, (*a*) That after the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and

A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers, as a feme sole.

(*a*) *Ex parte Mary Gill*, 1 Bingh. Rep. 168, N. S.

except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter-directed: provided always, that this act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

Not to extend to copyholds in certain cases.

MARRIED WOMEN—(continued.)

Saving of other Powers, otherwise Authorities.

The powers of disposition given to a married woman by this act not to interfere with any other powers.

78. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

Acknowledgment of Deeds, not of consent.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

79. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as herein after provided.

Separate Examination.

The judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

80. And be it further enacted, That such judge, master in chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

Perpetual Commissioners.

As to the appointment of perpetual commissioners for each county or place, and the making out and

81. And be it further enacted, That for the purpose of providing convenient means of taking the acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county,

riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places FOR which they shall be respectively appointed to act, shall from time to time be made made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

keeping of the lists of the commissioners and the delivery of copies.

MARRIED WOMEN—(continued.)

Power of perpetual Commissioners.

82. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

Power of perpetual commissioners not confined to any particular place.

Special Commissioners.

83. And be it further enacted, That in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

Memorandum of Acknowledgment.

84. And be it further enacted, (*a*) that when a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned;

(*a*) *In re Sarah Luke*, wife of *G. Luke*, an infant, 1 Bingh. Rep. 265, N. S.; 5 Moore & Sc. Rep. 80; 3 Dowl. Pr. Ca. 112.

may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—

'This deed, marked [*here add some letter or other mark for the purpose of identification*,] was this day produced before me [*or* us] and 'acknowledged by therein named to be her act and deed; 'previous to which acknowledgment the said was examined by me [*or* us] separately and apart from her husband, 'touching her knowledge of the contents of the said deed and her 'consent thereto, and declared the same to be freely and voluntarily 'executed by her.'

MARRIED WOMEN—(continued.)

Separate Certificate of Acknowledgment.

and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

And the same judge, master in chancery, or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; videlicet,—

'These are to certify, that on the day of 'in the year one thousand eight hundred and before 'me the undersigned Sir *Nicholas Conyngham Tindal*, Lord Chief 'Justice of the Court of Common Pleas at Westminster, [*or* before 'me Sir *James Parke*, knight, one of the justices of the Court of 'King's Bench at Westminster; *or* before me the undersigned *James* '*William Farrar*, one of the masters in ordinary of the Court of 'Chancery; *or* before us *A. B.* and *C. D.* two of 'the perpetual commissioners appointed for the for taking 'the acknowledgments of deeds by married women, pursuant to an 'act passed in the year of the reign of his majesty King 'William the Fourth, intituled An Act [*insert the title of this act*]; '*or* before us the undersigned *A. B.* and *C. D.* two of the 'commissioners specially appointed pursuant to an act passed in the ' year of the reign of his majesty King William the Fourth, 'intituled An Act [*insert the title of this act*] for taking the acknow-'ledgment of any deed by the wife of] 'appeared personally the wife of and produced a 'certain indenture, marked [*here add the mark*] bearing date the ' day of and made between [*insert the name of the* 'parties], and acknowledged the same to be her act and deed: And I '[*or* we] do hereby certify, that the said was, at the time 'of her acknowledging the said deed, of full age and competent un-'derstanding, and that she was examined by me [*or* us], apart from 'her husband, touching her knowledge of the contents of the said 'deed, and that she freely and voluntarily consented to the same.'

Filing Certificate with an Affidavit to verify it.

Certificate with affidavit verifying the same, to be lodged with some officer of the Court

85. And be it further enacted,(*a*) That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom

(*a*) *Anonym.*. 5 Moo. & Sc. 53.

the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas.

of Common Pleas, who shall cause the same to be filed of record in the court.

MARRIED WOMEN—(continued.)

Effect of filing Certificate—Relation back.

86. And be it further enacted, That when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

Index of Certificates.

87. And be it further enacted, That the officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient: and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

The officer with whom the certificates are lodged to make an index of the same.

Copies of Certificates—Evidence.

88. And be it further enacted, That after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

Officer to deliver a copy of certificate filed, which shall be evidence.

Power of the Court of Common Pleas defined.

89. And be it further enacted, That the Lord Chief Justice o the Court of Common Pleas at Westminster, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the

Chief justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination

memorandums, certificates, affidavits, &c.

commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

MARRIED WOMEN—(continued.)

Copyholds — Equitable Interests.

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

90. And be it further enacted, That in every case in which a husband and wife shall either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.

Dispensation with Husband's Concurrence.

Court of Common Pleas, in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the lord chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

91. Provided always, and be it further enacted,(*a*) That if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or nōt, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: Provided always,

(*a*) *In re Thomas Rule*, 4 Moo. & Sc. 331.

that this clause shall not extend to the case of a married woman where under this act the lord high chancellor, lord keeper or lords commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his majesty's high Court of Chancery, shall be the protector of a settlement in lieu of her husband.

IRELAND.

92. And be it further enacted, That this act shall not extend to Ireland, except where the same is expressly mentioned. Ireland.

REPEAL.

93. And be it further enacted, That this act, or any part thereof, may be altered, varied, or repealed by any act or acts to be passed in the present session of parliament. Act may be altered this session.

LAW OF DOWER.

3 & 4 WILLIAM IV. c. 105.

[*Royal Assent*, 29th August, 1833.]

An Act for the Amendment of the Law relating to Dower.

DEFINITIONS.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing. Meaning of the words in the act; "Land." Number.

DOWER IN EQUITY.

2. And be it further enacted, That when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) then his widow shall be entitled in equity to dower out of the same land. Widows to be entitled to dower out of equitable estates.

SEISIN OF HUSBAND.

3. And be it further enacted, That when a husband shall have been entitled to a right of entry or action in any land, and his widow Seisin shall not be necessary to give title to dower.

would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

ALIENATION, CONDITIONS, SATISFACTION, &c. BY HUSBAND.

No dower out of estates disposed of.

4. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, or by his will.

Priority to partial estates, charges and specialty debts.

5. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Dower may be barred by a declaration in a deed;

6. And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

or by a declaration in the husband's will.

7. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower may be subject to restrictions.

8. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower unless, &c.

9. And be it further enacted, That where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Bequest of personal estate to the widow shall not bar her dower unless, &c.

10. And be it further enacted, That no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

AGREEMENT NOT TO BAR DOWER.

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, That nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

PRIORITY OF LEGACIES IN LIEU OF DOWER.

12. And be it further enacted, That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. Legacies in bar of dower still entitled to preference.

DOWER *ad ostium*, &c. ABOLISHED.

13. And be it further enacted, That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris. Certain dowers abolished.

SAVING AND RESTRAINING CLAUSE.

14. And be it further enacted, That this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower. Act not to take effect before the 1st January, 1834.

LAW OF INHERITANCE.

3 & 4 WILL. IV. c. 106.

[*Royal Assent*, 29th August, 1833.]

An Act for the Amendment of the Law of Inheritance.

DEFINITIONS.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, advowsons, messuages and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, shall be in possession, reversion, remainder or contin- Meaning of the words in the act: "Land."

"The purchaser." gency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land

"Descent." acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or

"Descendants." other issue, and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such

"Person last entitled." ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits

"Assurance." thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred

Number and gender. at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

DESCENT—ROOT OF.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

2. And be it further enacted, That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

DEVISE TO HEIR—LIMITATION TO GRANTOR, &c.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. And be it further enacted, That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

LIMITATION TO HEIRS, AS PURCHASERS.

Where heirs take by purchase under limitations to the heirs of their ancestor, the

4. And be it further enacted, That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand

eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

land shall descend as if the ancestor had been the purchaser.

BROTHERS AND SISTERS.

5. And be it further enacted, That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Brothers, &c. shall trace descent through their parent.

LINEAL ANCESTORS.

6. And be it further enacted, That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

Lineal ancestor may be heir in preference to collateral persons claiming through him.

MALE LINE, MALE STOCKS.

7. And be it further enacted and declared, That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The male line to be preferred.

MOTHER OF REMOTEST MALE ANCESTOR.

8. And be it further enacted and declared, That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

HALF BLOOD.

9. And be it further enacted, That any person related to the person from whom the descent is to be traced by the half blood shall be ca-

Half blood, if on the part of a male ancestor, to in-

herit after the whole blood of the same degree; if on the part of a female ancestor, after her.

pable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

ATTAINTED BLOOD.

After the death of a person attainted, his descendants may inherit.

10. And be it further enacted, That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

COMMENCEMENT OF ACT.

Act not to extend to any descent before Jan. 1834.

11. And be it further enacted, That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

COMMENCEMENT—LIMITATION TO HEIR AS PURCHASER.

Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

12. And be it further enacted, That where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

DIRECTIONS AND OBSERVATIONS

FOR THE USE OF THE FOLLOWING

TABLE OF DESCENT.

THE *Roman* numerals indicate the course of descent before the alterations made by the stat. 3 & 4 Wm. 4, c. 106, and the *Arabic* numerals indicate the course of descent since these alterations. In this, as in every table of descent according to the common law, the priority of males to females, the right of seniority among males, the right of equal partition among females, and the right of representation, are implied. Such part of the first of Mr. Justice Blackstone's Canons of Descent (*a*) as requires actual seisin, and as excludes lineal ascent,—such part of the second of those canons as might induce a preference of a male of the half-blood to a female of the whole blood of the same degree,—such part of the fifth of those canons as by implication excludes lineal ancestors and the half-blood, and the sixth of those canons expressly excluding the half-blood, appear to be alone altered by the recent statute. The Propositus must, under the old law, have been the person last actually seised of the property in respect of which the descent was to be traced; but may, under the new law, be the last person who had a right thereto, whether he shall or shall not have obtained the actual possession, or the receipt of the rents and profits thereof. See the 1st section of the statute 3 & 4 Wm. 4, c. 106. In every case in which it shall be proved that the Propositus inherited the property, or that he and also one or more of his ancestors successively inherited it, then one of the two chief lines of ancestors, or one of the lines and some portion of the other line will be excluded from inheriting the property. See the 2d section of the above-mentioned statute. In those parts of the table where relatives of the half-blood might have been, but are not, introduced, the reader will assume that none existed. The preceding observations are applicable also to the engraved table of descent.

(*a*) See *post*, p. 504.

TABLE OF

ACCORDING TO AS WELL THE LAW *BEFORE*, AS

I. 1. Eldest son
II. 2. Second son } Descending line.
III..... 3. The daughters

4. FATHER.....Paternal ascending line.

IV..... 5. Eldest brother
V. 6. Second brother } Collateral ancestors from the same two parents.
VI..... 7. The sisters

Paternal Ancestors.

8. Only brother of the half-blood from the father.
9. All the sisters of the half-blood from the father.
10. PATERNAL GRANDFATHER.

VII..... 11. Paternal uncles and aunts.
12. Paternal uncles and aunts of the half-blood from the paternal grandfather.
13. Paternal grandfather's father.
VIII. ... 14. Father's paternal uncles and aunts.
15. Father's paternal uncles and aunts of the half-blood from the paternal grandfather's father.
16. Paternal grandfather's paternal grandfather.
IX. 17. Paternal grandfather's paternal uncles and aunts.
18. Paternal grandfather's paternal grandmother.
19. Paternal grandfather's mother.
20. Father's paternal uncles and aunts of the half-blood from the paternal grandfather's mother.
21. Paternal grandfather's maternal grandfather.
X..... 22. Paternal grandfather's maternal uncles and aunts.
23. Paternal grandfather's maternal grandmother.

24. PATERNAL GRANDMOTHER.
25. Paternal uncles and aunts of the half-blood from the paternal grandmother.
26. Paternal grandmother's father.
XI. 27. Father's maternal uncles and aunts.
28. Father's maternal uncles and aunts of the half-blood from the paternal grandmother's father.
29. Paternal grandmother's paternal grandfather.
XII..... 30. Paternal grandmother's paternal uncles and aunts.
31. Paternal grandmother's paternal grandmother.
32. Paternal grandmother's mother.
33. Father's maternal uncles and aunts of the half-blood from the paternal grandmother's mother.

THE LAW *SINCE* THE STATUTE 3 & 4 WM. 4, c. 106.

34. Paternal grandmother's maternal grandfather.
XIII. . . . 35. Paternal grandmother's maternal uncles and aunts.
36. Paternal grandmother's maternal grandmother.

Maternal Ancestors. 37. MOTHER.
38. Only brother of the half blood from the mother.
39. All the sisters of the half-blood from the mother.
40. MATERNAL GRANDFATHER.
XIV. 41. Maternal uncles and aunts.
42. Maternal uncles and aunts of the half-blood from the maternal grandfather.
43. Maternal grandfather's father.
XV. 44. Mother's paternal uncles and aunts.
45. Mother's paternal uncles and aunts of the half-blood from the maternal grandfather's father.
46. Maternal grandfather's paternal grandfather.
XVI. . . . 47. Maternal grandfather's paternal uncles and aunts.
48. Maternal grandfather's paternal grandmother.
49. Maternal grandfather's mother.
50. Mother's paternal uncles and aunts of the half-blood from the maternal grandfather's mother.
51. Maternal grandfather's maternal grandfather.
XVII. . . 52. Maternal grandfather's maternal uncles and aunts.
53. Maternal grandfather's maternal grandmother.

54. MATERNAL GRANDMOTHER.
55. Maternal uncles and aunts of the half-blood from the maternal grandmother.
56. Maternal grandmother's father.
XVIII. . . 57. Mother's maternal uncles and aunts.
58. Mother's maternal uncles and aunts of the half-blood from the maternal grandmother's father.
59. Maternal grandmother's paternal grandfather.
XIX. 60. Maternal grandmother's paternal uncles and aunts.
61. Maternal grandmother's paternal grandmother.
62. Maternal grandmother's mother.
63. Mother's maternal uncles and aunts of the half-blood from the maternal grandmother's mother.
64. Maternal grandmother's maternal grandfather.
XX. 65 Maternal grandmother's maternal uncles and aunts.
66. Maternal grandmother's maternal grandmother.

See the directions and observations preceding the above Table.

The CANONS OF DESCENT, as stated by Mr. JUSTICE BLACKSTONE, in his COMMENTARIES on the Laws of ENGLAND, B. ii. c. 14, are as follows.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum;* but shall never lineally ascend.

II. A second general rule or canon is, that the male issue shall be admitted before the female.

III. A third rule or canon of descent is this; that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

IV. A fourth rule or canon of descent is this; that the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

V. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female (that is kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,)—unless where the lands have, in fact, descended from a female.

CREDITORS BY SIMPLE CONTRACT.

3 & 4 WILL. IV. c. 104.

[*Royal Assent*, 29th August, 1833.]

An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and Contract Debts.*

* *Sic.*

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity under and by virtue of this act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

APPORTIONMENT OF RENTS, &c.

4 WILL. IV. c. 22.

[*Royal Assent*, 16th June, 1834.]

An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities and other Periodical Payments.

11 G. 2, c. 19.

WHEREAS by an act passed in the eleventh year of the reign of his Majesty King George the Second, intituled *An Act for the more effectual securing the Payment of Rents, and preventing Frauds by Tenants*, it was enacted, That where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life should and might, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion, of such rent, according to the time such tenant for life lived of the last year or quarter of a year or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively: and whereas doubts have been entertained whether the provisions of the said act apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act; and it is therefore desirable that such doubts should be removed by a declaratory law: and whereas, by law, rents, annuities and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands, and other evils arise from such rents, annuities and other payments not being apportionable, which evils require remedy: be it therefore enacted and declared by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that rents reserved and made payable on any demise or lease of lands, tenements or hereditaments, which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or

Rents reserved on leases determining on the death of the person making them (though not strictly tenant for life), or on the death of the tenant pur autre vie, to be considered as within the provisions of recited act.

her executors or administrators (as the case may be), be considered as within the provisions of the said recited act.

All rents, annuities, and other payments coming due at fixed periods to be apportioned;

2. And be it further enacted, That from and after the passing of this act all rents service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity.

subject to all just deductions.

Remedies for obtaining the apportioned parts.

Act not to apply to certain cases.

3. Provided always, and be it enacted, That the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description.

ESCHEAT AND FORFEITURE OF ESTATES, &c. HELD IN TRUST.

4 & 5 WILL. IV. c. 23.

[*Royal Assent*, 27th June, 1834.]

An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in Trust.

WHEREAS great inconvenience has been found to result to persons beneficially entitled to real or personal property by the escheating or forfeiture thereof to his majesty, to corporations, to lords of manors and others, in consequence of the death without heirs, or the conviction for treason or felony, of a trustee in whom or in whose name the same is vested: and whereas it is expedient that the same should be remedied: and inasmuch as, in order to avoid repetition, certain words are used in this act as describing subjects, some of which, according to their usual sense, such words would not embrace; for the understanding of the sense attached to them in this act, be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the provisions of this act shall extend to and include the several estates and persons, matters and things hereinafter mentioned; (that is to say,) those relating to land, to any manor, messuage, tenement, hereditament or real property, whether freehold, customaryhold, copyhold or of any tenure whatever; those relating to chattels, to personal property of every description capable of being transferred or disposed of otherwise than in books kept by any company or society, or to any share thereof or interest therein; those relating to stock, to any fund, annuity or security transferable in books kept by any company or society established or to be established, or to any money payable for the discharge and redemption thereof, or to any share or interest therein; those relating to dividends, to interest or other annual produce; those relating to a conveyance, to any lease and release, surrender or other assurance of real property, including all acts and deeds necessary for making and perfecting the same; those relating to an assignment, to any surrender, delivery or other disposition of the personal property, and to all acts, deeds and things necessary for making and perfecting the same; those relating to a transfer, to any payment or other disposition of stock; those relating to an heir, to any devisee or other real representative, by the common law, or by custom or otherwise; and those relating to an executor, to any administrator or other personal representative; unless there be something in the subject or context repugnant to such construction; and whenever this act, in describing or referring to any trustee or other person, or any trust, land, stock, conveyance, assignment, transfer, grant, matter or thing, uses the word importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females as well as males, and bodies corporate

Description of estates and matters included in the provisions of this act, and construction of terms used.

as well as individuals, and several trusts, lands, stocks, conveyances, assignments, transfers, grants, matters or things, respectively as well as one trust, land, stock, conveyance, assignment, transfer, grant, matter or thing respectively, unless there be something in the subject or context repugnant to such construction.

If trustee or mortgagee of any land die without an heir, Court of Chancery may appoint a person to convey.

2. And be it enacted, That where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the eleventh year of King George the Fourth and the first year of his present majesty, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain Cases," in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir.

Lands, &c. vested in any trustee shall not be escheated by reason of the attainder of such trustee.

3. And be it further enacted, That no land, chattels or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs or successors, or to any corporation, lord of a manor or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place.

To whom and to what cases this act shall extend.

4. And be it enacted, That the several provisions of this act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law or by construction of equity.

This act not to prevent the escheat of any beneficial interest.

5. Provided always, and be it hereby enacted, That nothing contained in this act shall prevent the escheat or forfeiture of any land, chattels or stock vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such land, chattels or stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

Where any person possessing lands, &c. as a trustee shall have died without heirs, or have been convicted, before the passing of this act, the lands, &c. shall become subject to the control of the Court of Chancery.

6. "And whereas it is expedient to relieve persons beneficially entitled to real or personal property which has already escheated or become forfeited to his majesty, to corporations, to lords of manors or others, by any of the means aforesaid;" be it therefore enacted, That in all cases where before the passing of this act any person possessed of or entitled to any land, chattels or stock, or any right to or interest in any land, chattels or stock, as a trustee thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every or any such case the said land, chattels or stock, or the

right thereto or interest therein which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, controul and disposition of the Court of Chancery, for the use of the party beneficially interested therein in such manner, and subject in all respects to such rights and incidents, and to such orders and regulations of the said court, under the provisions of the said act of the eleventh year of King George the Fourth and of the first year of his present majesty, as if such person so dead without an heir, or so convicted, as aforesaid, were out of the jurisdiction of or not amenable to the process of the said court, without having been so convicted: provided always, that nothing in this clause contained shall extend to any land, chattels or stock now vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels or stock which more than twenty years prior to the passing of this act shall have been actually vested in possession or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture.

Proviso.

EXCHANGES IN COMMON FIELDS.

4 & 5 WILL. IV. c. 30. (a)

[*Royal Assent*, 25th July, 1834.]

An Act to facilitate the Exchange of Lands lying in Common Fields.

WHEREAS it is expedient to facilitate the exchange of pieces of land lying intermixed and dispersed in common fields, meadows, or pastures, for other pieces of land, either lying therein, or being part of the inclosed lands in the same or any adjoining parish: may it therefore please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act it shall be lawful for any person who shall be seised or possessed of or entitled in possession to any land in any common field, as tenant in fee simple, or in fee tail, general or special, or for life or lives, or by the curtesy of England, or for any other estate of freehold, or for years determinable on any life or lives or for any term of years whereof one hundred years shall be unexpired, and for the guardian, trustee, feoffee for charitable or other uses, husband, or committee of such person who at the time of making any exchange authorized by this act shall be an infant, idiot, lunatic, or feme covert, or under any other disability, by such deed and with such consent as herein-after mentioned to grant and convey such land or any part thereof to any other person in lieu of and in exchange for any other land, whether lying in the same or any other common field, or for any inclosed land lying within the same or any adjoining parish, and to accept and take from such other person any land in lieu of and in exchange for the land in such common field.

Proprietors of lands in common fields may exchange the same.

(a) The above act, upon which no comment has been made in this work, is inserted to render the collection of the new statute law relating to real property more complete. It is open to much observation, but will probably be re-enacted in an amended state.

All persons enabled to give land in exchange for such common field land.

2. And be it further enacted, That it shall be lawful for any person who shall be seised or possessed of or entitled in possession to any land which it may be desirable to exchange for the land in such common field, whether such person shall be tenant in fee simple, or in fee tail, general or special, or for life or lives, or by the curtesy of England, or for any other estate of freehold, or for years determinable on any life or lives, or for any term of years whereof one hundred years shall be unexpired, and for the guardian, trustee, feoffee for charitable or other uses, husband, or committee of such person who shall be an infant, idiot, lunatic, or feme covert, or under any other disability, to consent and agree to such exchange, and to grant and convey such land to the person proposing to make such exchange in lieu of and in exchange for the land lying in such common field, subject to the provisions herein-after contained.

Land given in exchange by persons having limited interests to be of equal value with lands taken.

3. Provided always, and be it further enacted, That when any such exchange shall be made by any person having a less estate or interest than in fee simple in the land to be by him granted or conveyed in exchange, or shall be made by any person under any disability, the land to be so taken in exchange shall at the time of making such exchange be, or shall by the payment of a sufficient sum for equality of exchange be made, of equal value with or not of less value than the land to be granted or conveyed in exchange.

If exchange made by any person having only a limited interest, or being under disability, the consent of the person next in remainder to be obtained.

4. And be it further enacted, That whenever any exchange shall be proposed to be made under the authority of this act, and either of the parties thereto shall have a less estate or interest in the land to be by him granted or conveyed in exchange than a fee simple, or shall be under any disability, such exchange shall not be completed unless the person to whom the next immediate vested estate of freehold in remainder or reversion shall have been limited (provided such person shall be of the full age of twenty-one years, and being a female shall be unmarried,) shall consent thereto, and shall testify such consent by signing the draft deed of exchange herein-after mentioned, and such consent shall be sufficient for the purpose of authorizing such exchange notwithstanding the person giving the same may have an equitable estate only in the land intended to be conveyed in exchange, or may have previously disposed of or charged or incumbered his reversionary estate therein: provided always, that if the person to whom such next immediate vested estate in remainder or reversion may have been limited shall at the time of such exchange happen to be an infant or feme covert, or an idiot or lunatic, then and in such case it shall be lawful for the guardian or husband or committee of such infant, feme covert, idiot, or lunatic (such guardian, husband, or committe not being himself the person by whom the exchange is proposed to be made) to consent to such exchange, and to sign the draft deed of exchange in his or her stead; provided further, that whenever the guardian or husband or committee of such infant, feme covert, idiot, or lunatic, shall himself be the person by whom such exchange is proposed to be made, then and in such case it shall be lawful for the Court of Chancery, upon petition, to be preferred to the said court in a summary way, to appoint a person to act as protector to such infant, feme covert, idiot, or lunatic for the purposes of

In case the person next in remainder should be an infant, &c.

this act, and, if he shall think fit so to do, to consent to such exchange, and to sign the draft deed of exchange in the stead of such infant, feme covert, idiot, or lunatic, or of his or her guardian, husband, or committee.

Consent of patron and bishop necessary for exchange of land held in right of a church.

5. Provided always, and be it further enacted, That no exchange shall be made of any land held in right of any benefice, without the consent of the patron thereof, and of the archbishop or bishop to whose ordinary or peculiar jurisdiction the said benefice may be subject, such consent to be signified by the patron and archbishop or bishop respectively signing the draft deed of exchange herein-after mentioned; and such consent, when so given and signified, shall be a sufficient authority for such exchange, any law or statute to the contrary notwithstanding: provided always, that if the patronage of such benefice shall happen to be in the crown, and the benefice shall exceed the yearly value of twenty pounds in the King's books, it shall be lawful for the Lord High Treasurer or the First Lord Commissioner of the Treasury for the time being, but if it shall not exceed the yearly value of twenty pounds in the King's books, then for the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the great seal for the time being, to consent to such exchange and to sign the draft deed of exchange on behalf of the crown, and if the patronage of such benefice shall happen to be in the crown in right of the Duchy of Lancaster it shall be lawful for the Chancellor for the time being of the said Duchy to consent to such exchange and to sign the draft deed of exchange on behalf of the crown; and if the patronage of such benefice shall be part of the possessions of the Duchy of Cornwall it shall be lawful for the Duke of Cornwall for the time being, if of full age, but if not of full age, or in case such benefice shall be within the patronage of the crown in right of the Duchy of Cornwall, then for the same person who is herein-before authorized to consent on behalf of the crown in respect of a benefice in the patronage of the crown to consent to such exchange and to sign the draft deed of exchange on behalf either of the Duke of Cornwall, or, as the case may be, on behalf of the crown in right of the Duchy of Cornwall; and if the patron of such benefice shall happen to be a minor, idiot, lunatic, or feme covert, it shall and may be lawful for the guardian, committee, or husband of such patron to consent to such exchange and to sign the draft deed of exchange in the stead of such patron, and on his or her behalf.

Draft deed of exchange to be signed or sealed by ecclesiastical person or corporation consenting.

6. Provided always, and be it further enacted, That no exchange shall be made under the authority of this act by any bishop, dean, or other head of a chapter, archdeacon, prebendary, or other ecclesiastical corporation sole, unless, in the case of a bishop, with the consent of the archbishop of the province, to be signified by such archbishop signing the draft deed of exchange herein-after mentioned, or unless, in the case of a dean or other head of a chapter, with the consent of the chapter, to be signified by their affixing their common seal to the said draft deed of exchange, or unless, in the case of an archdeacon, prebendary, or other ecclesiastical corporation sole, with the consent of the archbishop or bishop of the diocese, to be signified by such archbishop or bishop signing the said draft deed of exchange.

7. And be it further enacted, That every exchange under the authority of this act shall be made according to the form in the schedule to this act annexed, or as near thereto as the number of parties and the circumstances of the case will admit, and shall, when executed by the respective parties, be valid and effectual in the law to all intents and purposes, without livery of seisin made or taken, or any other act done, by any person or party to perfect or complete the same.

Exchange to be made in the form given in the schedule.

8. Provided always, and be it further enacted, That whenever any land held by copy of court roll shall be exchanged under the authority of this act, the deed of exchange, when executed by the respective parties, shall be produced to the lord of the manor of which the land may be parcel, or to his steward, or to the deputy of such steward, who shall cause the same to be entered on the court rolls of the manor.

In case of copyholds, the deed of exchange to be entered on the court rolls.

9. And be it further enacted, That the fees and charges to be demanded by and paid to any steward of a manor for entering on the court rolls of such manor any deed of exchange or other instrument required by this act to be entered thereon shall not exceed the sum of sixpence for every law folio of seventy-two words contained in such deed or other instrument.

Fees to stewards.

10. And be it further enacted, That whenever any exchange shall be made under the authority of this act by any archbishop, bishop, dean or other head of a chapter, dean or other head of a chapter and chapter, archdeacon, prebendary, or other ecclesiastical corporation, or by the incumbent of any benefice, the deed of exchange, when executed by the respective parties, shall, in the case of the exchange being made by an archbishop or bishop, be entered in his own registry, and in the case of the exchange being made by a dean or other head of a chapter, or by a dean or other head of a chapter and chapter, be entered in the registry of such chapter, and in the case of the exchange being made by an archdeacon, prebendary, or other ecclesiastical corporation, or by the incumbent of a benefice, be entered in the registry of the bishop of the diocese.

In case of church lands, deed to be entered in the proper ecclesiastical registry.

11. And be it further enacted, That an office copy of any deed of exchange or other instrument which under the provisions of this act shall be entered on any such registry as aforesaid (such office copy being certified by the registrar or his deputy) shall be allowed as evidence thereof in all courts and places, and every person shall be entitled to require any such office copy, and shall also be allowed at all usual and proper times to search for and inspect any deed of exchange or other instrument which shall be so entered; and the registrar shall be entitled to charge for the entry of every such deed of exchange or other instrument after the rate of sixpence for every law folio of seventy-two words contained therein, and the sum of one shilling, and no more, for allowing any such search or inspection as aforesaid, and after the rate of sixpence for every law folio of seventy-two words in any office copy to be made and certified as aforesaid.

Office copies of instruments deposited in the registry to be evidence.

Draft of intended exchange to be deposited with the clerk of the peace, and notice thereof inserted in some newspaper circulated in the county.

12. And be it further enacted, That before any exchange shall be made under the authority of this act a draft of the intended deed of exchange, containing a correct description of the several lands proposed to be exchanged, and signed by the respective parties, and also by the several persons whose consent to such exchange is hereinbefore required to be given, and accompanied by an estimate of the value as well of the land proposed to be given as of the land proposed to be taken in exchange, and whenever the exchange shall be proposed to be made by or with any person under disability, then accompanied also by a copy of the several limitations contained in the deed or will under which such person may be entitled, shall be deposited with the clerk of the peace of the county in which the greater part of the land may be situated; and a notice of such draft and estimate having been so deposited (such notice containing a description of the land intended to be exchanged) shall be published in some newspaper usually circulated in the county wherein such land is situated at three several times in three successive months after such draft and estimate shall have been so deposited: provided always, that whenever a corporation aggregate shall be one of the parties to such proposed exchange, or the consent of a corporation aggregate shall be necessary thereto, the affixing of the common seal of such corporation to such draft deed of exchange shall be deemed a sufficient compliance with the provisions of this act.

Proviso as to certain corporations.

Persons having any objection to deposit same in writing with the clerk of the peace within a certain time.

13. And be it further enacted, That if any person claiming to have an interest in the land proposed to be exchanged shall object to such exchange, it shall be lawful for him to state such objection in writing, and to deposit the same with the clerk of the peace at any time not less than fourteen days before the holding of the assizes at which such proposed exchange shall be taken into consideration as hereinafter mentioned; and such draft deed of exchange, and estimate, and copy of limitations, and the said statement of objection, shall be open to the inspection of any person.

Fees to be taken by clerks of the peace.

14. And be it further enacted, That the justices of the peace for the several counties, ridings, divisions, cities, towns, liberties and precincts within England and Wales, shall in the manner directed by an act passed in the fifty-seventh year of the reign of King George the Third, intituled "An Act to enable Justices of the Peace to settle the Fees to be taken by the Clerks of the Peace of the respective Counties and other Divisions of England and Wales," ascertain, make and settle a table of fees and allowances to be taken by the clerks of the peace for such counties, ridings, divisions, cities, towns, liberties and precincts, for their trouble in the execution of the duties imposed upon them by this act, and such fees shall be subject to alteration and regulation in the manner by the said act directed.

Clerk of the peace to cause the draft deed, &c. to be laid before a judge of assize, who shall appoint a barrister to consider the same.

15. And be it further enacted, That the clerk of the peace shall cause the said draft deed of exchange, estimate and statement of objection (if any), and all other papers relating thereto, to be laid before the senior judge of nisi prius at the assizes to be holden next after the expiration of three months from the time of the deposit of such draft deed of exchange with the clerk of the peace as aforesaid; and such

judge shall appoint a barrister, of not less than five years standing, for taking into consideration the said draft deed and statement, who shall forthwith appoint a time for that purpose.

Barrister may summon witnesses.

False swearing perjury.

16. And be it further enacted, That such barrister shall be empowered to summon and to compel the attendance of witnesses, and to administer an oath; and that any person wilfully swearing falsely before such barrister shall be liable to all the penalties of wilful perjury.

Barrister to examine witnesses, and determine objections.

17. And be it further enacted, That such barrister shall satisfy himself, by the production of deeds, the examination of witnesses, or by such other evidence as he shall think fit to require, of the value of the lands proposed to be exchanged, and that the person proposing to make such exchange is not under any disability, or if he is that the person stated to have the next immediate vested estate of freehold in reversion or remainder has such estate, and that the notices and the consents required by this act have been duly given; and such barrister shall hear and determine all objections (if any) which may have been made by any person claiming to have an interest in the land proposed to be exchanged.

After inquiry the barrister to certify as the case may be.

18. And be it further enacted, That after such inquiry shall have been had before such barrister he shall grant a certificate under his hand, in which he shall state that the parties proposing to make such exchange are not under any disability, or if they are, or either of them is under disability, that the persons or person having the next immediate vested estate of freehold in remainder or reversion have concurred therein, that the persons whose consents are required under this act have consented to the exchange, and that the equality and fairness of the proposed exchange have been proved, or otherwise, as the case may be; and he shall suggest in such certificate such alterations as to him may seem expedient for the better protecting the rights of parties having an interest in the lands proposed to be exchanged.

In case of an exchange in which there shall be a difference in value of not more than one fifth.

19. And be it further enacted, That in any case of an exchange to be made under this act in which there shall be a difference of not more than one fifth in the value of the lands proposed to be exchanged, it shall be lawful for the said barrister to allow or insert a provision in such exchange for the payment in money of such difference in value: provided always, that no exchange shall be made under the authority of this act in which there shall be a difference of more than one fifth part in the value of the lands proposed to be exchanged.

Certificate with draft deed, &c. to be laid before the judge, who shall make order thereupon.

20. And be it further enacted, That the said certificate, together with the said draft deed of exchange, and estimate, and such statement of objections, if any, and all other papers relating thereto, shall be laid before the said judge of assize, who shall thereupon make such order therein, either for confirming the said exchange, or for annulling the same, or for altering the same, as to him may seem expedient; and the said draft deed of exchange when so confirmed or altered by the said order shall be immediately engrossed and executed by the necessary parties, and shall, when so executed, be binding upon the owners

and proprietors of the pieces of land so exchanged, and all other parties interested therein: provided always, that before making such final order it shall be lawful for such judge to institute or cause to be instituted such further inquiry, by the means aforesaid, into the several matters relating to any such agreement, as he may think necessary.

Judge may institute further inquiry.

Costs and charges of proceedings.

21. Provided also, and be it enacted, That such barrister shall further certify to the said judge by whom and in what proportions the costs and charges of such proceedings relative to such agreement ought to be borne, and thereupon the said judge shall make such order for payment of such costs and charges as he may think right: provided always, that in the case of any disagreement respecting the amount of such costs, such costs shall be taxed by the master or secondary of the Court of King's Bench.

Remuneration to barrister.

22. And be it further enacted, That every barrister before whom any inquiry shall be had under the authority of this act shall be entitled to be paid at the rate of five guineas for every day that he shall be employed in making such inquiry, over and above his travelling and all other expenses; and every such barrister shall after the termination of such inquiry transmit a statement of the number of days during which he shall have been so employed, and an account of the travelling and all other expenses incurred by him in respect of such employment, to the judge by whom he shall have been appointed, or, in case of the death or illness or retirement of such judge, to any other judge of the superior courts of record at Westminster, who shall examine and allow the same, or so much or such parts thereof as he shall see fit; and the same when so allowed shall be paid in the same manner as the other costs and charges incident to such exchange are hereinbefore directed to be paid: provided always, that if more than one case of exchange shall be referred to the same barrister, the remuneration to such barrister shall not be cumulative, but shall be considered as fixed for the day and not for the case.

Application of money paid for equality of exchange when party entitled to same under disability.

23. And be it further enacted, That in case any money shall be directed to be paid by either party to the other of them for equality of exchange, and the party to whom such money shall be directed to be paid shall (in case it shall exceed the sum of twenty pounds) be paid with all convenient speed into the Bank of England in the name and with the privity of the accountant-general of the Court of Chancery, to be placed to his account there *ex parte* the person entitled to the rents and profits of the land for or in respect of which such money shall be payable, to the intent that such money shall be applied, under the direction of the court, to be signified by an order made in a summary way upon a petition to be preferred by or on behalf of the person who would have been entitled to the rents and profits of the said land, either in the purchase or redemption of the land-tax, or in discharging any debt or incumbrance affecting the said land, or affecting any other lands standing settled therewith to the same or the like uses, or in the purchase of other lands, which shall be conveyed to the same or the like uses, or such of them as shall be then subsisting and capable of taking effect; and in the meantime and until such purchase shall be made the said money shall, by order of the said court, upon application

thereto, be invested by the said accountant-general in his name in some of the public funds, and the dividends thereof shall from time to time be paid to the person who would have been entitled to the rents of the land so to be purchased and settled; but in case such money shall not exceed the sum of twenty pounds, then the same shall be paid to the person entitled to the rents and profits of the land for or in respect of which the same may be payable, or in case of infancy, lunacy, idiotcy or coverture, to his or her guardian, committee or husband, as the case may be.

Lands given in exchange to be exonerated from the uses affecting them at the time, and to become subject to such uses as affected the lands taken.

24. And be it further enacted, That from and immediately after such deed of exchange as herein-before mentioned shall have been duly executed by the necessary parties, the land which by such deed is given in exchange shall be exonerated and discharged from the uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances, as affected the land taken in exchange at the same date; and the land so taken in exchange shall be exonerated and discharged from all uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances as affected the land given in exchange at the same time.

After exchange party not to be evicted.

25. And be it further enacted, That no person to whom any land shall have been granted or conveyed in exchange according to the provisions of this act shall at any time thereafter be evicted from the peaceable and quiet possession of such land by reason or in consequence of any person claiming right thereto through any title prior to that of, or through any defect of title in, the person by whom such land may have been granted or conveyed; but nevertheless it shall be lawful for the person claiming such right, and he is hereby authorized and empowered, to use, exercise, and enjoy all such and the same powers and remedies in trying his right to and in obtaining and recovering possession of the land which shall have been granted or conveyed in exchange as the person so claiming would in case this act had not been made have been enabled to use, exercise, or enjoy in trying the right to and recovering the possession of the land in exchange for which the same shall have been so granted or conveyed under the authority of this act.

General saving.

26. Saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person, bodies politic, corporate, and collegiate, his and their heirs, successors, executors, and administrators, (other than and except the several owners and proprietors of the said exchanged lands, and the several persons and parties who shall have consented to such exchange, and all other persons claiming under them, or under the same will or deed or other conveyance as the said owners and proprietors, any right, title, estate, or interest to or in the said exchanged lands,) all such estate, right, title, interest, claim, and demand whatsoever as they, every or any of

them had before the making and confirming of any such exchange, or could or might have had or enjoyed in case such exchange had not been made.

Meaning of words in the act.

27. And be it further enacted, That the words and expressions herein-after mentioned which in their ordinary signification have a more confined or a different meaning, shall in the construction of this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that

"Person."

is to say, the word "person" shall extend as well to an individual as to a body politic, corporate, or collegiate, and to a corporation as well aggregate or sole, whether such corporation be eleemosynary or civil,

"Benefice."

ecclesiastical or lay; the word "benefice" shall extend to and be taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries, district parishes and district chapelries, and churches and chapels having a district assigned

"Land."

thereto: the word "land" shall extend to every species of land, whether arable, meadow, or pasture, and whether freehold, copyhold, or customary, or held by any other tenure, and as well to one piece or parcel as to any number of pieces or parcels of land; and every

Number and gender.

word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

To extend to England and Wales.

28. And be it further enacted, That this act shall extend only to that part of the United Kingdom called England and Wales.

Act may be altered this session.

29. And be it further enacted, That this act or any of the provisions thereof may be altered or repealed by any act to be passed in this present session of parliament.

The Schedule to which the foregoing Act refers.

This indenture, made the ——— day of ——— in the year ——— between *A. B.* of ——— of the one part, and *C. D.* of ——— of the other part, witnesseth, that in pursuance and under the authority of an act passed in the ——— year of the reign of his majesty King William the Fourth, intituled [*here set forth the title of this act*], the said *A. B.* doth grant and convey all the land comprised in the first schedule hereunder written, marked with the letter A., unto the said *C. D.*, in lieu of and in exchange for the land comprised in the second schedule hereunder written, marked with the letter B., to the end and intent that the land comprised in the first schedule may be held and enjoyed by the said *C. D.* and the person or persons who for the time being shall be entitled thereto, and be and become subject to such and the same uses, trusts, powers, conditions, limitations, restrictions, charges, and incumbrances as the land comprised in the second schedule now is or may be subject or liable to: And this indenture further witnesseth, that in pursuance of the said act the said *C. D.* doth grant and convey all the land comprised in the

second schedule hereunder written, marked with the letter B., unto the said *A. B.*, in lieu of and in exchange for the land comprised in the first schedule hereunder written, marked with the letter A., to the end and intent that the land comprised in the second schedule may be held and enjoyed by the said *A. B.* and the person or persons who for the time being shall be entitled thereto, and be and become subject to such and the same uses, trusts, powers, conditions, limitations, restrictions, charges, and incumbrances as the land comprised in the first schedule now is or may be subject or liable to. In witness, &c.

Schedule A. containing the land conveyed by *A. B.* to *C. D.*

Schedule B. containing the land conveyed by *C. D.* to *A. B.*

Witness
E. F. *A. B.* (L. S.)
G. H. *C. D.* (L. S.)

MODUS FOR AND DISCHARGE FROM TITHES.

4 & 5 WILL. IV. c. 83.

[*Royal Assent*, 15th August, 1834.]

An Act to amend an Act passed in the Third Year of his present Majesty, intituled An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes.

WHEREAS by an act passed in the third year of the reign of his present majesty, intituled "An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or Discharge of Tithes," certain provisions were made limiting the period within which in cases of claims of a modus decimandi the payment or render of such modus, and in cases of claim of or to any exemption from or discharge of tithes by composition real or otherwise, the enjoyment of the land without payment or render of tithes or money, or other matter in lieu thereof, should be shown to have taken place: And whereas it was by the said act further enacted, that nothing therein contained should be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters therein mentioned, then commenced, or which might be thereafter commenced during the then session of parliament, or within one year from the end thereof: And whereas since the passing of the said act a great number of suits have been instituted for the recovery of tithes, under the apprehension on the part of the plaintiffs that they would be precluded by the said act from recovering the tithes to which they claim to be entitled unless they prosecuted their claims within the periods limited by the said act: And whereas it is deemed advisable to enable the defendants in such suits to cause all further proceedings therein to be suspended until

2 & 3 W. 4, c. 100

the end of the next session of parliament, upon the terms hereinafter expressed: Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act it shall and may be lawful for the defendant or defendants in any action or suit which may have been commenced or instituted since the passing of the said recited act for the recovery of tithes, or for invalidating claims of a modus decimandi, or an exemption from or discharge of tithes, for lands in respect whereof no tithes, nor any composition in lieu thereof, shall have been actually rendered or paid within the space of sixty years previous to the passing of this act, with the consent of the plaintiff or plaintiffs in such action or suit, to pay the amount of the costs and expenses (to be taxed as between party and party) which may have been incurred by or on the part of the plaintiff or plaintiffs in such action or suit into the Bank of England, in the name and with the privity of the accountant general of the Court of Chancery or of the Court of Exchequer, or of the proper officer of the court in which such action or suit shall have been brought, to the credit or on account of such action or suit; and in every case where such costs and expenses shall be so paid into court, all further proceedings in such action or suit (except as herein-after provided) shall be stayed and suspended until the end of the next session of parliament.

Proceedings stayed on defendant's paying costs into court.

2. And be it further enacted, That from and after the end of the next session of parliament it shall and may be lawful for the plaintiff or plaintiffs in any action or suit, in which the defendant or defendants shall have caused the proceedings to be stayed or suspended under the provision herein-before contained to give notice to the defendant or defendants of his, her, or their intention to proceed in such action or suit and to proceed therewith accordingly; and then and in every such case the defendant or defendants shall, immediately after such notice shall have been so given, be entitled to receive out of court the sum or sums which such defendant or defendants shall have previously paid into court on account of the costs of the plaintiff or plaintiffs.

Plaintiff may give notice to defendant of his intention to proceed; in which case the defendant may have his costs out of court.

3. Provided always, and be it further enacted, That it shall and may be lawful for the plaintiff or plaintiffs in any action or suit in which the defendant or defendants shall have paid into court the costs of such plaintiff or plaintiffs under the provision herein-before contained, to take the sum or sums which may have been so paid for such costs out of court, for his, her or their own use, and then and in every such case all further proceedings in such action or suit shall be for ever abandoned and relinquished.

If plaintiff accepts the costs, all proceedings to be abandoned.

4. And be it further enacted, That it shall and may be lawful for the successors, heirs, executors, administrators, or assigns of any plaintiff or plaintiffs, whose action or suit may be so stayed or suspended as aforesaid, to revive and proceed with such action or suit after the end of the next session of parliament, or to take such costs as aforesaid out of court, and cause all further proceedings to be abandoned

Successors, heirs, &c. may act in case of death.

and relinquished, in the same manner and in every respect as the original plaintiff or plaintiffs might or could have done.

Judges may, upon sufficient cause shown, permit actions to be proceeded with.

5. Provided always, and be it enacted, That notwithstanding the provision herein-before contained it shall and may be lawful for any party to any action or suit so suspended, upon adducing sufficient proof to the satisfaction of a judge of the court in which such action or suit shall have been commenced that there is danger of some material evidence in support of the right or claim of such party being lost in consequence of such suspension, to proceed in such action or suit to the extent of proving such fact or facts, the evidence respecting which shall be so shown as aforesaid to be in danger of being lost through such suspense.

As to previous claims.

6. Provided always, and be it enacted, That nothing in this act contained shall prevent the prosecution of any suit in law or equity for the recovery of any tithes claimed or demanded previous to the passing of the said recited act, or for the recovery of the value thereof.

FINES AND RECOVERIES.

4 & 5 WILL. IV. c. 92.

[*Royal Assent*, 15th August, 1834.]

An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland.

DEFINITIONS.

Meaning of certain words and expressions.

BE it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That in the construction of this act the word "lands" shall extend to advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure, and whether corporeal or incorporeal, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, right, title, lien, or incumbrance in, upon, to, or affecting lands, either at law or in equity, whether present or vested, or future or contingent, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the

"Lands."

"Estate."

"Base fee."

"Estate tail."

"Actual tenant in tail."

"Tenant in tail." expression "tenant in tail" shall mean, not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who if the base fee had not been created would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands of any tenure in England or elsewhere out of Ireland where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance, already made or hereafter to be made, whether by deed, will, private act of parliament, or otherwise, by which lands are or shall be entailed or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement; and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: provided always, that these words and expressions occurring in this clause to which more than one meaning is to be attached shall not have the different meanings given to them by this clause in those cases in which there is any thing in the subject or context repugnant to such construction.

"Tenant in tail entitled to a base fee."

"Money subject to be invested in the purchase of lands."

"Person."

Number and gender.

Settlement.

FINES AND RECOVERIES.

Abolition Clause.

No fine or recovery to be levied or suffered after the 31st of October, 1834, except on writ prior to that day.

2. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, no fine shall be levied or common recovery suffered of lands of any tenure in Ireland, except where parties intending to levy a fine or suffer a common recovery shall before the thirty-first day of October, one thousand eight hundred and thirty-four, have sued out a writ of dedimus or any other writ in the regular proceedings of such fine or recovery; and any fine or common recovery which shall be levied or suffered contrary to this provision shall be absolutely void.

FINES AND RECOVERIES—(continued.)

Covenants and Agreements—Special Substitution Clause.

Persons liable after 31st October, 1834, to levy fines or suffer recoveries under covenants, shall effect the purposes intended by means of this act; but if such cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed, which shall have the same operation as the fine or recovery.

3. And be it further enacted, That in case any person shall, after the thirty-first day of October, one thousand eight hundred and thirty-four, be liable to levy a fine or suffer a common recovery of lands of any tenure in Ireland, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into, or hereafter to be entered into before the first day of November, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of October, one thousand eight hundred and thirty-four, be subject and liable under such covenant or agreement to make or to procure to be made such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of October, one thousand eight hundred and thirty-four, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of October, one thousand eight hundred and thirty-four, be liable under such covenant or agreement to execute or to procure to be executed some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine and recovery would have had if the same had been actually levied or suffered.

FINES AND RECOVERIES—(continued.)

(REMEDIAL CLAUSES, 4—5—6—7—8—9.)

Errors in Fines.

Fines made valid without amendment.

4. And be it further enacted, That if it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Errors in Recoveries.

Recoveries made valid without amendment.

5. And be it further enacted, That if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Jurisdiction to amend, saved.

Saving jurisdiction in cases not provided for.

6. Provided always, and be it further enacted, That nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Defect of Tenant to Præcipe—Non-inrolment of Bargain and Sale.

Recoveries made valid in certain cases where bargain and sale is not duly inrolled.

7. And be it further enacted, That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

Defect of Legal *Tenant to Præcipe.*

Recoveries invalid in consequence of there not being proper tenants to

8. And be it further enacted, That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such

recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

the writs of entry made valid in certain cases.

FINES AND RECOVERIES—(continued.)

Remedial Clauses qualified.

9. Provided always, and be it further enacted, That where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery if valid shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery if valid would have barred, nor any fine or common recovery which before the passing of this act any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity pending at the time of the passing of this act in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

Certain cases in which fines and recoveries shall not be made valid by this act.

Records and Proceedings.

10. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, the records of all fines and common recoveries levied and suffered in his majesty's Court of Common Pleas in Dublin, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said

As to the records of fines and recoveries in the court of Common Pleas in Dublin after the 31st of Oct. 1834.

Court of Common Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same place where they are now deposited, and be kept by the person who would have continued entitled to the custody thereof if this act had not been passed; and while the said records and proceedings shall be kept by such person, searches may be made, and extracts and copies obtained, as heretofore. and on paying the accustomed fees; and when any of the records and proceedings shall by the order of the said court be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made, and extracts or copies obtained, at such times and on paying such fees as shall from time to time be ordered by the said court; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed.

WARRANTIES MADE AFTER DECEMBER 31, 1834.

Estates tail, and estates expectant thereon, not barrable by warranty made after 31st Oct. 1834.

11. And be it further enacted, That all warranties of lands which after the thirty-first day of October, one thousand eight hundred and thirty-four, shall be made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

TENANTS IN TAIL.

General enabling Clause.

Power, after the 31st of Oct. 1834, to dispose of lands entailed in fee simple or for a less estate, saving the rights of certain persons.

12. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons whose estates are to take effect after the determination or in defeasance of any such estate tail, including the king's most excellent majesty, his heirs and successors, as regards the title to his majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

TENANTS IN TAIL—(continued.)

Ex provisione viri, &c.—Restraining Clause.

13. Provided always, and be it further enacted, That where, under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the tenth year of the reign of his Majesty King Charles the First, intituled, "An Act for the Exposition of the Statute of Fines," the power of disposition hereinbefore contained as to such lands shall not be exercised by her, except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Charles the First, have rendered valid a fine or common recovery levied or suffered by her of such lands. Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 10 C. 1. sess. 2, c. 8 (Ireland) except with assent.

Repeal of Irish Statute, 10 Car. 1, sess. 2, c. 8.

14. Provided always, and be it further enacted, That, except as to lands comprised in any settlement made before the passing of this act, the said act of the tenth year of the reign of his Majesty King Charles the First shall be and the same is hereby repealed. Except as to lands in settlements before this act, the act 10 C. 1, c. 8, repealed.

Tenants in Tail after Possibility, &c.

15. Provided always, and be it further enacted, That the power of disposition hereinbefore contained shall not extend to tenants in tail after possibility of issue extinct. Power of disposition limited.

Base Fees.—Enabling Clause.—Reversion, &c. in Crown.

16. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute, including the king's most excellent majesty, his heirs and successors, as regards the title to his majesty in any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorised to be made: Provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing of this act have been granted to any person or persons by his majesty, or any of his predecessors, in any reversion or remainder which may have come to the crown by attainder or otherwise. Power after the 31st of Oct. 1834, to enlarge base fees; saving the rights of certain persons. Proviso.

TENANTS IN TAIL—(continued.)

Heirs in Tail expectant.—Restraining Clause.

Issue inheritable not to bar expectancies.

17. Provided always, and be it further enacted, That nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein.

Dispositions for a limited purpose.

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

18. Provided always, and be it further enacted, That if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate pour autre vie, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

Protectorship—instituted.

The owner of the first existing estate under a settlement prior to an estate tail under the same settlement, to be the protector of the settlement.

19. And be it further enacted, That if at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate,) shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an

estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

TENANTS IN TAIL—(continued.)

Protectorship—Plurality of Owners.

20. Provided always, and be it further enacted, That where two or more persons shall be owners, under a settlement within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share.

Each of two or more owners of a prior estate to be the sole protector as to his share.

Protectorship—Married Women.

21. Provided always, and be it further enacted, That where a married woman would if single be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

Enabling Clause—Contingent Interests.

22. And be it further enacted, That from and after the thirty-first day of October, one thousand eight hundred and thirty-four, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: Provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition.

Persons empowered to dispose of contingent interests.

Protectorship—Estates confirmed or restored.

23. Provided always, and be it further enacted, That, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

As to estates confirmed or restored by settlement.

TENANTS IN TAIL—(continued.)

Protectorship—Lessees under Settlements excluded.

As to leases at rent created by settlement.

24. Provided always, and be it further enacted, That where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

Protectorship—Dowress, Trustee, &c. excluded.

No tenant in dower, heir, executor, &c. to be protector, except in the case of a bare trustee.

25. Provided always, and be it further enacted, That no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made before the thirty-first day of October, one thousand eight hundred and thirty-four,) no bare trustee, heir, executor, administrator or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

Protectorship—In Cases of Exclusion.

Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

26. Provided always, and be it further enacted, That where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who if such estate did not exist would be the protector of the settlement shall be such protector.

Protectorship—Right to make Tenant to Præcipe.

Where, in the disposition of an estate before the 31st Oct. 1834, the person to make the tenant to the writ of entry in a recovery shall be the protector.

27. Provided always, and be it further enacted, That where already, or before the thirty-first day of October, one thousand eight hundred and thirty-four, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Protectorship—Tenant to Præcipe—Reversions, &c.

Where, in the case of the disposition of a reversion on or before the 31st of Oct. 1834, the person to make the tenant to the writ of entry in a recovery shall be the protector.

28. Provided always, and be it further enacted, That where any person having either already, or before the thirty-first day of October, one thousand eight hundred and thirty-four, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the

barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

TENANTS IN TAIL—(continued.)

Protectorship—Bare Trustee in Settlements before the Act.

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

29. Provided always, and be it further enacted, That where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Protectorship—Power to appoint and create Powers to appoint Protector.

Power to any settlor to appoint the protector.

30. Provided always, and be it further enacted, That it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate during the whole or any part of such period the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery in Ireland, within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector shall have ceased to be so by death

or relinquishment of the office by deed, and no other person shall have been appointed in their place.

TENANTS IN TAIL—(continued.)

Protectorship—Lunatic, Traitor, Felon, &c.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c. the Court of Chancery to be the protector.

31. Provided always, and be it further enacted, That if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Ireland, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Ireland, for the time being, or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot or of unsound mind as aforesaid; or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery in Ireland shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid; or if any settlor entailing lands shall in the settlement by which the lands shall be entailed declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

Tenant in tail—Protector's Consent.

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

32. Provided always, and be it further enacted, That if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against

all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

TENANTS IN TAIL—(continued.)

Owner of Base Fee—Protector's Consent.

Where a base fee, and a protector, his consent requisite to the exercising of a power of disposition.

33. Provided always, and be it further enacted, That where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Protector—his Irresponsibility, &c.

The protector to be subject to no control in the exercise of his power of consenting.

34. And be it further enacted, That any device, shift or contrivance by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

Protectorship—Exclusion of Equity.

Certain rules of equity not to apply between protector and a tenant in tail under the same.

35. Provided always, and be it further enacted, That the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

Involuntary Confirmation of voidable Estates.

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

36. Provided always, and be it further enacted, That when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the

effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estates so far as such tenant in tail would then be capable under this act of confirming the same without such consent: provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

TENANTS IN TAIL—(continued.)

Base Fees—Enlargement of.

Base fees, when united with the immediate reversions, enlarged instead of being merged.

37. And be it further enacted, That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

Mode of Assurance—General substitution Clause.

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

38. And be it further enacted, That every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed.

Involment of Assurance.

Every assurance by a tenant in tail, except a lease not exceed.

39. Provided always, and be it further enacted, That no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding

twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent), shall have any operation under this act, unless it be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the tenth year of the reign of his Majesty King Charles the First, intituled "An Act expressing an Order for Uses, Wills, and Testaments," shall if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of the tenth year of the reign of King Charles the First.

ing twenty-one years at a rack rent, or not less than five-sixths of a rack rent, to be inoperative unless inrolled in Chancery in Ireland within six calendar months.

10 C. 1, sess. 2, c. 1, s. 17, Ireland.

TENANTS IN TAIL—(continued.)

Protectorship—Mode of Consent.

40. And be it further enacted, That the consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Consent of the protector to be given by the same assurance or by a distinct deed.

Protectorship—As to Consent by distinct Deed.

41. And be it further enacted, That if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

Protectorship—Consent irrevocable.

42. And be it further enacted, That it shall not be lawful for the protector of a settlement, who, under this act, shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Protector not to revoke his consent.

Protectorship—Consent of Married Women.

43. And be it further enacted, That any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

A married woman protector to consent as a feme sole.

Protectorship—Inrolment of distinct Deed.

44. Provided always, and be it further enacted, That the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be ef-

Consent of a protector by distinct deed void, unless inrolled with or

before the assurance.

fected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery, either at or before the time when the assurance shall be inrolled.

TENANTS IN TAIL—(continued.)

Jurisdiction of Equity—Exclusion of.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

45. And be it further enacted, That in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under this act in a court of law.

Protectorship—Consent of Lunatic, &c.

Lord Chancellor, &c. to have the power to consent to disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

46. Provided always, and be it further enacted, That in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery in Ireland, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) to make such orders in the matter as shall be thought necessary; and if such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said Court of Chancery (as the case may be,) shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall

be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

TENANTS IN TAIL—(continued.)

Protectorship.

47. Provided always, and be it further enacted, That in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery in Ireland, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

Order of the Lord Chancellor, &c. to be evidence of consent.

Bankrupts—Partial Repeal of 11 & 12 *Geo.* 3, *c.* 8.

48. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, so much of an act passed in the eleventh and twelfth years of the reign of his Majesty King George the Third, intituled "An Act to prevent Frauds committed by Bankrupts," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements and hereditaments, whereof such bankrupt shall be seised of any estate tail in possession, reversion or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, shall be and the same is hereby repealed: Provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt which hath been or shall be issued before the thirty-first day of October, one thousand eight hundred and thirty-four.

Repeal of the Bankrupt Act, 11 & 12 G. 3, c. 8, so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission issued before the 31st of Oct. 1834.

Bankrupt—Actual Tenant in Tail.

49. And be it further enacted, That any commissioner acting in the execution of any commission which after the thirty-first day of October, one thousand eight hundred and thirty-four, shall be issued in pursuance of the said act, passed in the eleventh and twelfth years of the reign of King George the Third, under which any person shall be adjudged a bankrupt who at the time of issuing such commission, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of Oct. 1834, by deed to dispose of the lands of the bankrupt to a purchaser.

which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

TENANTS IN TAIL—(continued.)

Bankrupt—Base Fee.

Commissioner, in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

50. And be it further enacted, That any commissioner acting in the execution of any such commission as aforesaid under which any person shall be adjudged a bankrupt who at the time of issuing such commission, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Bankrupt—Actual Tenant in Tail—Base Fee—Consent of Protector.

As to the consent of the protector in case of bankruptcy.

51. And be it further enacted, That the commissioner acting in the execution of any such commission as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said act of the eleventh and twelfth years of King George the Third, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act, with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of

giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

TENANTS IN TAIL—(continued.)

Bankrupt—Inrolment &c. of Deeds of Disposition

As to the inrolment of the deed of disposition of lands.

52. And be it further enacted, That every deed by which any commissioner acting in the execution of any such commission as aforesaid shall, under this act, dispose of lands, shall be void unless inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof.

Bankrupt—Enlargement of Base Fees.

Subsequent enlargement of base fees created by the disposition of the commissioner.

53. And be it further enacted, That if any commissioner acting in the execution of any such commission as aforesaid shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Bankrupt—Same.

Enlargement of base fees subsequently to the sale or conveyance of the same under the bankrupt acts.

54. And be it further enacted, That if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said act of the eleventh and twelfth years of King George the Third, or any other act hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the commission under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Bankrupt—Confirmation of voidable Estates.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail

62. Provided always, and be it further enacted, That where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant

entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such, if with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such commission as aforesaid, and the commissioner acting in the execution of such commission shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the eleventh and twelfth years of King George the Third, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: Provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument making such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

TENANTS IN TAIL—(continued.)

Bankrupt—Certain of his acts avoided.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

56. And be it further enacted, That all acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such commission as aforesaid, and which shall affect such lands or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Bankrupt—Subordinate Powers of Disposition.

57. Provided always, and be it further enacted, That, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such commission as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate, and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

TENANTS IN TAIL—(continued.)

Bankrupt—Dead.

58. And be it further enacted, That any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such commission as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say), in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

Bankrupt—Intermediate Rents, Covenants, and Conditions.

59. And be it further enacted, That the rents and profits of any lands of which any commissioner acting in the execution of any such commission as aforesaid hath power to make disposition under this act, shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the commission, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of

Assignees to recover rents of the lands of a bankrupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion.

debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute made in the fifteenth year of the reign of his majesty King George the Second, intituled "An Act for the more effectual securing the Payment of Rents and preventing Frauds by Tenants," or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions, and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition, and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and of proceeding under the various statutes passed in Ireland providing the remedies of ejectment for the nonpayment of rent, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements as the bankrupt would have had in case he had not been adjudged a bankrupt: Provided always, that this clause shall apply to lands of any tenure which any commissioner acting in the execution of any such commission as aforesaid may have power to dispose of under this act after the bankrupt's decease.

15 Geo. 2, c. 8.

Clause to apply to lands of any tenure, &c.

TENANTS IN TAIL—(continued.)

Bankrupt—Lands in England.

All the provisions of the act in regard to bankrupts shall apply to their lands in England.

60. And be it further enacted, That all the provisions in this act contained for the benefit of the creditors of persons who under such commissions as aforesaid shall be adjudged bankrupts after the thirty-first day of October, one thousand eight hundred and thirty-four, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in England.

Bankrupt—Lands in England—Inrolment.

Deeds relating to the lands of bankrupts in England to be inrolled in the court of chancery there.

61. Provided always, and be it further enacted, That in all cases of bankruptcy, every deed of disposition under this act of lands in England by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settle-

ment of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England, within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

ENTAILED MONEY.

Partial Repeal of former Acts.

Repeal of the statutes 58 G. 3. c. 46, and 7 G. 4, c. 45, except as to proceedings commenced before 1st Nov. 1834.

62. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, an act passed in the fifty-eighth year of the reign of his Majesty King George the Third, intituled "An Act for Relief of Persons entitled to Entailed Estates to be purchased with Trust monies in that Part of the United Kingdom called Ireland," and also an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled, "An Act for repealing an Act passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled, 'An Act for the Relief of Persons entitled to entailed Estates to be purchased with Trust Monies,' and for making further provision in lieu thereof," shall be, and the same are hereby repealed, except as to such proceedings under the acts hereby repealed as shall have been commenced before the first day of November, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the acts hereby repealed.

Entailed Money—Modes of Disposition.

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

63. And be it further enacted, That lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to: and all the previous clauses in this act, so far as circumstances will admit, shall in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled, and shall, in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of

bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands.

Bankrupt—Entailed Money—England—Inrolment.

Lands of any tenure in England, to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in England, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

Inrolment.

64. And be it further enacted, That so far as regards any person adjudged a bankrupt under any such commission as aforesaid, the provisions of the clause lastly herein-before contained shall, for the benefit of the creditors of the bankrupt, apply to lands in England to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in England, or of or to which any individuals as trustees may be possessed or entitled in England, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to England; provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in England to be so sold as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England.

Inrolment of Deeds—Acknowledgment.

Deeds need not acknowledgment before inrolment in Ireland.

65. And be it further enacted, That any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by this act requiring to be inrolled in his Majesty's High Court of Chancery in Ireland.

Inrolment of Deeds—Relation back.

Every deed to be inrolled in Ireland by which lands or money shall be disposed of under this act to take effect as if inrolment not required.

66. And be it further enacted, That every deed required to be inrolled in his Majesty's High Court of Chancery in Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming

the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

TENANTS IN TAIL—(continued.)

Inrolment in Ireland of Deeds—Fees.

The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

67. And be it further enacted, That it shall be lawful for his Majesty's High Court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the inrolment of such deeds, and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolments of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

MARRIED WOMEN, IF NOT TENANTS IN TAIL.

General enabling Clause.

A married woman, not tenant in tail, may, with her husband's concurrence, dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and may release and extinguish powers, as a feme sole.

68. And be it further enacted, That after the thirty-first day of October, one thousand eight hundred and thirty-four, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, disclaim, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter-directed.

Saving of other Powers.

The powers of disposition given to a married woman by this act not to interfere with any other powers.

69. Provided always, and be it further enacted, That the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition; but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same, shall contain a valid restriction against the anticipation thereof by such married woman.

MARRIED WOMEN—(continued.)

Acknowledgment of Deeds of Disposition.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

70. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Dublin, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as herein after provided.

Separate Examination.

The judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

71. And be it further enacted, That such judge, master in chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consents to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

Perpetual Commissioners.

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

72. And be it further enacted, That for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas in Dublin shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas in Dublin, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

MARRIED WOMEN—(continued.)

Power of perpetual Commissioners.

73. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

Power of perpetual commissioners not confined to any particular place.

Special Commissioners.

74. And be it further enacted, That in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas in Dublin, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

Memorandum of Acknowledgment.

75. And be it further enacted, That when a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed; which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned;

'This deed, marked [*here add some letter or other mark for the purpose of identification,*] was this day produced before me [*or* us] and acknowledged by therein named to be her act and deed; previous to which acknowledgment the said was examined by me [*or* us] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.'

Separate Certificate of Acknowledgment.

And the same judge, master in chancery, or commissioner, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,—

and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

'These are to certify, that on the day of in the year one thousand eight hundred and before me the undersigned , Lord Chief Justice of the Court of Common Pleas in Dublin, [*or* before me,

'one of the justices of the Court of King's Bench in Dublin, *or* before 'me the undersigned, one of the masters in ordinary of 'the Court of Chancery; *or* before us *A. B.* and *C. D.* 'two of the perpetual commissioners appointed for the 'for taking the acknowledgments of deeds by married 'women, pursuant to an act passed in the year of the reign 'of his majesty King William the Fourth, intituled An Act [*insert the* 'title of this act]; *or* before us the undersigned *A. B.* and 'C. D. two of the commissioners specially appointed pursuant 'to an act passed in the year of the reign of his majesty 'King William the Fourth, intituled An Act [*insert the title of this* 'act] for taking the acknowledgment of any deed by the 'wife of] appeared personally the wife of 'and produced a certain indenture, marked [*here add the mark*] bearing 'date the day of and made between [*insert the names* 'of the parties], and acknowledged the same to be her act and deed; 'And I [*or* we] do hereby certify, that the said was, at the 'time of her acknowledging the said deed, of full age and competent 'understanding, and that she was examined by me [*or* us], apart from 'her husband, touching her knowledge of the contents of the said 'deed, and that she freely and voluntarily consented to the same.'

MARRIED WOMEN—(continued.)

Filing Certificate, with an Affidavit verifying it.

Certificate with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the Court.

76. And be it further enacted, That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas in Dublin, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas.

Effect of filing Certificate—Relation back.

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

77. And be it further enacted, That when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

MARRIED WOMEN—(continued.)

Index of Certificates.

78. And be it further enacted, That the officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient: and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

The officer with whom the certificates are lodged to make an index of the same.

Copies of Certificates—Evidence.

79. And be it further enacted, That after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

Officer to deliver a copy of certificate filed, which shall be evidence.

Power of the Court of Common Pleas defined.

80. And be it further enacted, That the Lord Chief Justice of the Court of Common Pleas in Dublin, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas in Dublin shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandum and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

Cases of Dispensation with Husband's Concurrence.

81. Provided always, and be it further enacted, That if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas in Dublin, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of

Court of Common Pleas, in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the lord chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

the husband in any case in which his concurrence is required by this act or otherwise; and all acts, or deeds, to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman where under this act the lord high chancellor, lord keeper or lords commissioners for the custody of the great seal, or other person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his majesty's high Court of Chancery, shall be the protector of a settlement in lieu of her husband.

Act may be altered this session.

82. And be it further enacted, That this act, or any part thereof, may be altered, varied, or repealed by any act or acts to be passed in the present session of parliament.

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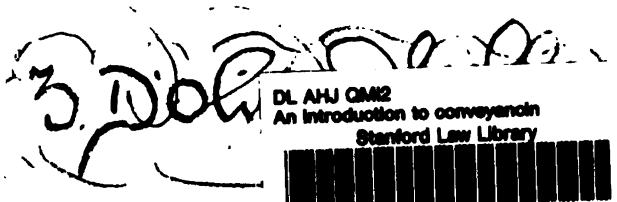
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